

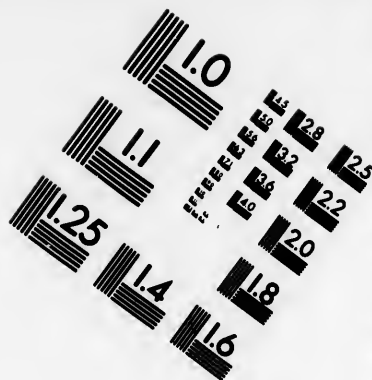
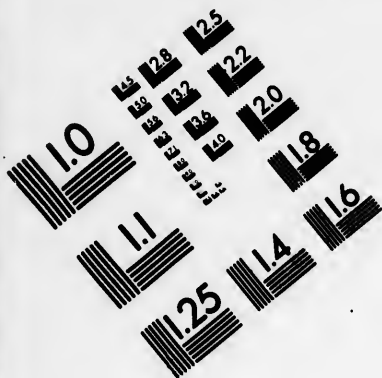
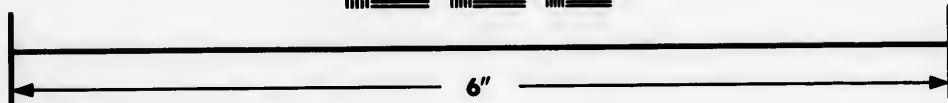
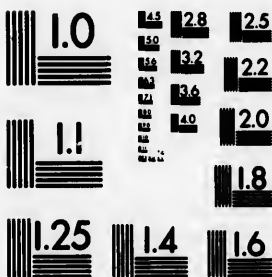


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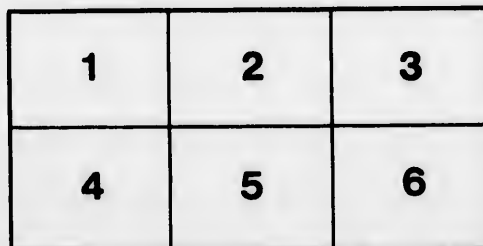
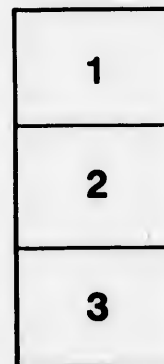
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BY
JOHN GIBBONS, LL. D.,
OF THE CHICAGO BAR.

VOL. VI.

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PREFACE.

Owing to the very great length of the Anarchist Conspiracy Murder Case, to include which this volume has been delayed a few days, the present is the largest of the series of the American Criminal Reports. Hereafter all decisions of importance will be published in this series as soon as they can be officially verified. It is the intention of the publishers and the editor to increase, if possible, the merit and usefulness of this series of reports, which are almost indispensable to the profession. Proof sheets of the Anarchist Case were submitted to and corrected by the Hon. Benjamin D. Magruder, Judge of the Supreme Court of Illinois, who wrote the opinion.

A condensed statement of the facts and statistics relative to the Anarchist Case, together with all the instructions to the jury, is published in volume five of this series. The present volume contains the final decision of this great case. I say final, for, while the United States supreme court may review the case, and it would doubtless be its duty to do so on proper showing, it will be decided by that court that the defendants have not been deprived of any right under the federal constitution. Every question appears to have been considered with scrupulous and conscientious care, and the conclusion arrived at seems irresistible from the facts presented. As the guilt or innocence of the defendants, in this case, depended more upon the facts than the law, the decision may not be marked with that great display of law learning which characterizes the opinions of a Marshall, a Shaw, or a Gibson in some celebrated cases which came before them judicially; nevertheless, from the masterly collocation of the facts in evidence, and the application of the principles of law governing offenses of a kindred nature to those facts, the opinion will compare favorably with any decision found in the books.

While the effect of the decision may fall harshly and severely upon the condemned, it must serve as a salutary and timely lesson to those who would set their faces against or attempt to overthrow the majesty of the law. The government of the United States "is a government of laws, not of men;" and all men, whether native or foreign-born, must understand that while they may here enjoy the largest liberty and live under the grandest constitution yet devised by man, the guaranties in favor of personal liberty and of the inviolability of the rights of property found in that instrument were not intended as licenses to commit crime.

Besides the cases cited in support of the legal propositions announced in the opinion, the decision of the supreme court of Pennsylvania in *Weston v. The Commonwealth*, published in this volume, is closely and strikingly in point.

While every case in this volume will be found to bear upon some special

question peculiar to the class of offense involved, the following may be mentioned as of superior importance to the profession: *Ex parte Bain*, denying the power of a court of the United States to amend an indictment except by resubmitting it to a grand jury; *United States v. Rauscher*, holding that a person extradited can only be tried upon the offense specified in the demand for his surrender — both cases decided by the supreme court of the United States; *The Queen v. Ashwell* and *The Queen v. Flowers* (Crown Cases Reserved) on larceny at common law and under the statute; *Martin v. Blattner*, and note on the Police Power of the State; *People ex rel. Munsell v. The Court of Oyer and Terminer*, and note, in which the distinction between a civil and criminal contempt is discussed; *The State v. Cunningham*, which holds that an indictment for perjury in making a false return to the assessor of taxable property must allege that the property concealed was assessable in the township; and *Maekin v. The People*, which holds that in an investigation before the grand jury, while it is the privilege of a witness to decline to answer questions, if in his opinion they would tend to criminate him, if he waives the privilege and undertakes to answer them, he must speak the truth.

CHICAGO, Sept. 30, 1887.

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AMERICAN CRIMINAL REPORTS.

PEOPLE V. PLATH.

(100 N. Y., 590.)

ABDUCTION: *Evidence necessary to convict—Corroborating testimony—Taking.*

1. To convict of abduction under section 282 of the Penal Code of New York, as amended by section 2, chapter 46, Laws of New York of 1884, not only must a "taking" be shown, but also that such taking was for the purpose of prostitution. The evidence corroborating that of the abducted female must tend to prove each of the facts constituting the crime.
2. And where the female, of her own free will, left her home and voluntarily entered defendant's concert saloon, and remained there a month, defendant not being previously acquainted with her, or having knowledge of her name or family, and no evidence having been given to corroborate her testimony, except that on being asked about her, defendant denied any knowledge of a girl by the name inquired for, and that he kept a disorderly house, such does not constitute the offense intended by section 282 of the Penal Code.
3. This section does not constitute the employment of a female, under the age of sixteen years, for immoral purposes, a criminal offense, unless it is accompanied with the taking of her person by some active agency for such purpose.

Wm. F. Howe, for appellant.

De Lancey Nicoll, for respondent.

RUGER, C. J. The defendant was indicted, and upon trial convicted, of the crime of abduction, in that he, "with force and arms, feloniously did take one Katie Kavanaugh for the purpose of prostitution; she, the said Katie Kavanaugh, being then and there a female under the age of sixteen years." It was essential to the support of this conviction that the people

show, not only a taking by the defendant within the meaning of the statute, but also that such taking was for the purpose of prostitution. Penal Code, § 282, as amended by sec. 2, ch. 46, Laws 1884. If the evidence establishes only a taking, and fails to show that it was *for the prohibited purpose*, it is insufficient to sustain the conviction; and so proof of the fact that the person of the female was used for purposes of prostitution, without proof of the abduction, would not bring the accused within the condemnation of the statute. It is elementary, when a specific intent is required to make an act an offense, that the doing of the act does not raise a presumption that it was done with the specific intent. Lawson on Presumptive Evidence, 472. Neither can a conviction under this act be sustained upon the unsupported evidence of the female abducted. Penal Code, § 283. In cases where corroboration is required, there has been some diversity of opinion in the authorities as to the particular facts which should be corroborated and the extent of the corroboration needed, in order to comply with the rule; but it is now conceded to be the general rule that it should tend to show the material facts necessary to establish the commission of a crime, and the identity of the person committing it. When an offense was formerly proven by accomplices, it was the usual practice of trial courts to advise an acquittal, unless such evidence was in some respects corroborated by other testimony (although at common law a conviction upon the evidence of the accomplice alone was sustainable). In those cases the extent and degree of corroboration rested in the discretion of the trial court, and necessarily varied according to the circumstances of the case. Although such cases are not strictly analogous to those where corroboration is required by statute, they yet furnish some help in determining the degree of proof required in the latter case. The rule as to the corroboration of an accomplice is stated in Roscoe, Crim. Ev., 122, as follows: "That there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference, not only that a crime has been committed, but that the prisoner is implicated in it." Russell on Crimes, 962, says "that it is not sufficient to corroborate an accomplice as to the facts of the case generally, but that he must be corroborated

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as to some material fact or facts which go to prove that the prisoner was connected with the crime charged." 1 Greenl. on Evidence, § 381, lays down the rule, as it is held by some, that it is "essential that there should be corroborating proof that the prisoner actually participated in the offense, and that, when several prisoners are to be tried, confirmation is to be required as to all of them before all can be safely convicted; the confirmation of the witness as to the commission of the crime being regarded as no confirmation at all as it respects the prisoner."

The policy of the statute under consideration would seem to forbid the conviction of a person of the crime of abduction upon the unsupported evidence of the subject of the crime, and a conviction founded upon the evidence of the abducted female alone, as to one of the elements constituting the crime, would be contrary to its implied prohibition. Such evidence must, therefore, tend to prove each of the facts constituting the crime, for otherwise a person might be convicted of an offense as to one of whose elements there existed no proof except that of the alleged abducted female. If the corroborative evidence goes to the support of the alleged purpose alone, it is apparent that there is no legal proof of the commission of a crime, and it would be the same if the corroboration was confined to a support of the taking alone, and the proof as to the purpose was uncorroborated. It is not indispensable that such corroboration should be furnished by positive and direct evidence, but proof of circumstances legitimately tending to show the existence of the material facts will be sufficient to authorize a conviction. In one form or the other, however, proof must be given, aside from that of the female, tending to establish the commission of a crime, and that it was perpetrated by the person accused, before a conviction can be lawfully had.

An examination of the proof in this case fails to disclose any evidence corroborating the testimony of the female alleged to have been abducted as to the participation of the defendant in the abduction, assuming that her evidence established a taking within the meaning of the statute. We have, however, grave doubts as to the sufficiency of such evidence to establish such taking. *Regina v. Olfier*, 10 Cox, Crim. Cas., 403.

But, passing over that question, we will examine the evi-

dence which it is claimed corroborated the testimony of the abducted female. Her evidence was to the effect that in July, 1884, the defendant kept a dance-hall or concert saloon and drinking place in Chatham street, New York, and had no previous acquaintance with or knowledge of the witness, her friends or family; that she was a young girl about fifteen years of age, of somewhat dissolute character, residing with her parents at Newark; that some time in the latter part of July, in company with a young companion, the former inmate of a house of prostitution, of her own free will, she visited New York without the consent of her parents, and in strolling about the streets came to defendant's saloon and entered. After sitting in the bar-room for a while she saw the defendant go behind the bar, and asked him "how much it was to see the entertainment;" he replied, "nothing, my little dear; come in." He then treated the girls to soda-water, and asked them if they came to stay, to which Kavanaugh replied that she did. He then invited the girls to go up stairs, and while there offered Kavanaugh a dress, which she declined. He also took indecent liberties with the persons of both girls, and after remaining there about twenty minutes, left them. Both girls voluntarily remained in the place several days, and the Kavanaugh girl for about one month, during which time she had intercourse with a large number of men. No evidence was furnished by the prosecution showing that the defendant knew the true name of the girl, *or the place of residence of herself or family, or that he had had any previous acquaintance with her, or knowledge of her family*, or their circumstances or condition. No direct proof was given tending to establish the existence of any fact testified to by Kavanaugh, but she was attempted to be supported by circumstances alone. Two witnesses testified that they visited defendant's saloon the latter part of August, and found quite a number of women and men assembled there engaged in dancing, drinking, and sitting around together, among whom was Kavanaugh. They asked defendant if he had there a girl by the name of Kavanaugh who came from Newark. Defendant denied any knowledge of such a girl, and offered to allow them to search the premises for her. While they were talking, Kavanaugh disappeared. It nowhere appeared that defendant was acquainted with the true name

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of Kavanaugh, or that she came from Newark. The witnesses also inspected the upper rooms of the sa'loon, and there found a number of small apartments filled with beds and bunks. They saw women intoxicated, and some quarreling and fighting going on. Afterwards, in September, one of the witnesses saw a man and woman in bed together there, and the man stated he was not the husband of the woman. A physical examination of the girl revealed appearances indicating that attempts at sexual intercourse with her had been made, but that in fact it never had been accomplished. Beyond this, no evidence was given looking towards corroboration of the testimony of the alleged abducted female.

We are utterly unable to see how this evidence tends to prove any of the facts going to show the agency of the defendant in inducing Kavanaugh, either to come to or remain in his place, unless a presumption of criminal persuasion is always to be imputed to a person with whom a dissolute female is domiciled. That he kept a disorderly house, and was engaged in a vile and reprehensible occupation, is quite sufficiently demonstrated, and that the object of Kavanaugh's residence in his house was presumably for the purpose of prostitution; but there is nothing in the corroborative proof inconsistent with the theory that her stay there was the result of her own will, uninfluenced by any persuasion, allurement or device of the defendant. The evidence does not tend to show that the influences inducing Kavanaugh to come or remain at the defendant's house were any different from those operating upon the other inmates of the place, or upon females generally who had not become inmates. It is a lamentable fact that a life of prostitution presents attractions to some young and inexperienced females, and that many are induced to enter upon it by the expectation of pleasures to be derived, wants to be supplied, or disagreeable social conditions to be escaped, and that from some or all of these combined, the haunts of vice and immorality are too largely supplied; but the statute in question was not intended to provide a remedy for this evil, or prescribe a punishment for those who keep such places. There is nothing in the section of the act under which defendant was convicted making the employment of a female under sixteen years of age for purposes of prostitution or sexual intercourse

a criminal offense, *except where it is accompanied with a taking of her person by some active agency for such purpose.* The word "takes" seems to be used to distinguish the act prohibited from those where the female is merely received or permitted and allowed to follow a life of prostitution, without persuasion or inducement by the person accused.

The statutory age under which the consent of the female does not deprive the act of sexual intercourse of its criminal effect is fixed at ten years, but over that age the act in question does not make such intercourse a crime, if effected, without persuasion or device, by the free will and consent of the female. The same evidence which has been produced against the defendant in this case could doubtless be given as to every keeper of a brothel or disorderly house in New York, and it would tend to impair confidence in the administration of the law, and confound the distinction in crimes made by statute, to permit this conviction to be upheld upon the proof shown by the record. Every criminal, however vile, has a right to require that the elements of his offense shall be clearly defined by law, and established by legal proof, before he can be convicted thereof, and until then he may safely assert his immunity from punishment for any offense which is not thus defined and proved. The defendant in this case is entitled to the same presumption of innocence which prevails in other cases, and we are constrained to say that evidence has not been given here rebutting such presumption. We think the evidence was insufficient, in the absence of the proper confirmatory proof, to warrant his conviction, and that the judgment of the general term and sessions should be reversed, and a new trial granted.

(All concur.)

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RAILING v. COMMONWEALTH.¹

(Opinion Sup. Ct. Pa. Filed October 5, 1885.)

ABORTION: *Degree of punishment — Dying declarations — Indictment.*

1. Death resulting from criminal abortion is not a necessary element in the offense, but fixes the degree of the punishment.
2. The competency of dying declarations is restricted to those cases in which the death is the subject of the charge; they are consequently inadmissible under an indictment for abortion.
3. Where an indictment charged an abortion by means of powders, it is not error for the court to charge that the abortion would be criminal if procured by an instrument, with criminal intent.

Error to the Quarter Sessions of Cumberland County.

Charles A. Railing was indicted for committing a criminal abortion upon the person of Annie A. Faust, in consequence of which she died. On the trial the commonwealth offered in evidence the dying declarations of the decedent, which were admitted; the court overruling the objection of the defendant. This testimony consisted in the statements made by the decedent to the witness, substantially as follows: That the defendant took her to a person unknown to her, who injected into her two black powders for the purpose of procuring an abortion, for which the defendant paid \$50. Other testimony showed that the decedent left her home in a sleigh with the defendant on a certain evening, and, after her return with him, became ill, and a few days later died. There was medical testimony to show that the miscarriage could have been produced by the cold ride, and that a *post-mortem* examination disclosed no signs of an operation. The court charged that it was not necessary for the commonwealth to prove the means by which the abortion was procured, as alleged in the indictment, provided the abortion itself was proved, in order to convict. The verdict was "guilty," and the defendant sentenced accordingly, whereupon he took this writ, assigning as error the charge of the court and the admission of the dying declarations of the decedent.

F. E. Belzhoover and *S. Hepburn, Jr.*, for plaintiff in error.

J. S. Stuart, district attorney, and *H. S. Stuart*, for defendant in error.

¹ See note.

GREEN, J. The principal question in this case is that which relates to the admissibility of the dying declarations of Annie Faust. The defendant was charged with administering to her a drug with intent to procure a miscarriage, and it was also charged that her death resulted as a consequence. There were four counts in the indictment, and all of them charged the death of the woman as the result of the defendant's unlawful act. It is entirely unquestioned that dying declarations are admissible only in homicide cases, as a rule, and that the death of the deceased must be the subject of the charge, and the circumstances of the death the subject of the declaration. 1 Greenl. Ev. (13th ed.), par. 156; Whart. Crim. Ev., 276; Whart. Amer. Crim. Law, par. 669 *et seq.*

It is equally unquestioned that there is no grade of homicide involved in this case, the offense charged being the one commonly known as abortion. It is argued, however, with much force that the death of the woman, when it occurs, is a necessary ingredient of the offense under our statute, and therefore brings the case within the rule above stated. It is claimed that the death is, in part at least, the subject of the charge. In one sense this is true. But the question is, is it so in the real sense of the rule which controls the subject? That inquiry involves the necessity of an examination of our criminal statute against abortion. It consists of two sections, the eighty-seventh and eighty-eighth of the Criminal Code of 1860. The eighty-seventh provides that if any person shall unlawfully administer any drug or substance to a pregnant woman, or use any instrument, with intent to procure her miscarriage, and she or the child shall die in consequence of such act, such person shall be guilty of felony and shall be sentenced to pay a fine not exceeding \$500 and to undergo imprisonment at labor not exceeding seven years. The eighty-eighth section provides that if any person, with intent to procure the miscarriage of any woman, shall unlawfully administer to her any drug or substance, or use any instrument or other means with like intent, he shall be guilty of felony, and be sentenced to pay a fine not exceeding \$500 and undergo an imprisonment at labor not exceeding three years. In the last case the offense is complete without the death of the woman or child. In both cases the grade of the offense is the same — felony. In both, the

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acts done by the prisoner are the same. In the first, if those acts are followed by the death of the mother or child as a consequence, that is, in the relation of effect to a cause, a difference results in one of the penalties imposed. The possible fine is the same, but the possible imprisonment is longer—seven years instead of three. The facts which constitute the crime are precisely the same in both cases, to wit: the administering the drug, or using the instrument with intent to procure a miscarriage. It follows that the death is no part of the facts which go to make up or constitute the crime. It is complete with the death or without it. The death, therefore, considered in and of itself, is not a constituent element of the offense. It may happen or it may not. If it does not happen, a certain possibility of penalty follows. If it does happen, the same character of penalty results, but with a larger possibility, not a certainty, in one of the items.

This seems to be a precise expression of the difference between the cases provided for in the two sections. This being so, the question recurs: Is the difference between the two of such a character as to change the application of the rule of law relating to the admissibility of dying declarations? Of course they are not admissible if death does not result as a consequence from the unlawful acts. Therefore, if the woman should subsequently die from some entirely different and independent cause, her dying declarations in relation to a prior miscarriage would be clearly incompetent. In case she does die in consequence of the unlawful acts, the crime charged and tried is not homicide in any of its forms, but the felony of administering a drug or using an instrument with intent to produce a miscarriage. In its facts and in its essence it is the same crime that is charged and tried if no death results. The death, when it occurs, is an incident, the sole purpose of which is to determine whether the imprisonment of the defendant may be longer than when death does not occur. The facts which constitute the crime may not be proved by any declarations of the woman when death does not follow, or when it follows from some other cause. Why, then, should the very same facts be proved by such declarations when death does result? Not because it is a homicide case and the rule as to dying declarations admits them in such cases, because it is not a case of

homicide in any point of view. Not because the death is the subject of the charge, for the charge is the attempted or accomplished mis carriage by means of a drug or instrument. That crime is as fully completed without the death as with it. The death, therefore, is not an essential ingredient of it. Its function under the statute, when it occurs as a consequence, is not to determine the *factum*, or the character, or the grade of the crime, but the character of the penalty to be endured by the criminal. Of course, if the statute had declared that when death resulted the offense should be manslaughter, or any other grade of homicide, the case would be entirely different. Then the death would be an essential ingredient of the offense, and would be the subject of the charge, and the rule as to dying declarations would apply. But such is not the case, and we do not think it wise to enlarge the operation of the rule so as to embrace cases other than homicide strictly.

The objections to the admission of such testimony are of the gravest character. It is hearsay, it is not under the sanction of an oath, and there is no opportunity for cross-examination. It is also subject to the special objection that it generally comes from persons in the last stages of physical exhaustion, with mental powers necessarily impaired to a greater or less extent, and, at the best, represents the declarant's perceptions, conclusions, inferences, and opinions, which may be, and often are, based upon imperfect and inadequate grounds. Nor is the reason ordinarily given for their admission at all satisfactory. It is that the declarant, in the immediate presence of death, is so conscious of the great responsibility awaiting him in the near future if he utters falsehood that he will, in all human probability, utter only the truth. The fallacy of this reasoning has been many times demonstrated. It leaves entirely out of account the influence of the passion of hatred and revenge, which almost all human beings naturally feel against their murderers, and it ignores the well-known fact that persons guilty of murder beyond all question very frequently deny their guilt up to the last moment upon the scaffold. But, in point of fact, the reason we are considering cannot be regarded as the real or the controlling reason for the rule, because, in terms, it would be just as applicable to declarations made by dying persons in regard to civil affairs,

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or to all minor criminal matters, as to the facts attending a homicide. In truth, there would be less temptation to falsify in regard to such matters than in regard to acts of violence perpetrated upon the person of the declarant. Yet it is undisputed that in all civil cases, and in all crimes other than homicide, such declarations are entirely incompetent.

A far better reason in support of the rule, as it seems to us, is that dying declarations are admitted from the necessity of the case, and in order that murderers may not go unpunished. Such a reason only can justify their admission in cases involving the life of the accused. While ordinarily the precautions against illegitimate testimony increase with the danger menacing the accused, in this one exceptional case of homicide they are relaxed, and the rule which excludes mere declarations in all other cases is removed.

In Whart. Crim. Ev., par. 278, the rule is thus stated: "Dying declarations are admitted from the necessity of the case to identify the prisoner and the deceased, to establish the circumstances of the *res gestæ*, and to show the transactions from which the death results." In 1 Greenl. Ev. (13th ed.), par. 156, the writer says: "These, or the like considerations, have been regarded as counterbalancing the force of the general principle above stated, leaving this exception to stand only upon the ground of the public necessity of preserving the lives of the community by bringing manslaughterers to justice. For it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other cases of felony, namely, the party injured, is himself destroyed." In the foot-note 2 to the above section the opinion of Judge Redfield is quoted in the following words: "But it was from a misapprehension of the true grounds upon which the declarations are receivable as testimony. It is not received upon any other ground than that of necessity, in order to prevent murder going unpunished. What is said in the books about the situation of the declarant, he being virtually under the most solemn sanction to speak the truth, is far from presenting the true ground of admission."

Believing this to be the true ground upon which to place the admissibility of dying declarations, it will be seen at once that they are incompetent, except in cases of actual homicide,

where the killing is the very substance and subject of the criminal accusation on trial. This we hold to be the true sense in which to interpret the rule that such declarations are only admissible where the death is the subject of the charge. All the text-books and a host of judicial decisions assert that the rule of admissibility is confined to cases of homicide. Thus this court in *Brown v. Com.*, 73 Pa. St., 327, states the rule, quoting from Whart. Amer. Crim. Law, par. 669, in these words: "The dying declarations of a person who expects to die, respecting the circumstances under which he received a mortal wound, are constantly admitted in criminal prosecutions where the death is the subject of criminal inquiry, though the prosecution be for manslaughter, though the accused was not present when they were made, and had no opportunity for cross-examination, and against or in favor of the party charged with the death."

There is a vast number of cases in which, where the prisoner is tried for a crime other than homicide, the dying declarations of the person upon whom the crime was perpetrated are inadmissible, though they relate to the circumstances of the crime. Thus, in *Rex v. Lloyd*, 4 Car. & P., 233, it was held that on an indictment for robbery the declarations *in articulo mortis* of the party robbed are not admissible in evidence. Bolland, B., said: "I think that declarations *in articulo mortis* are not admissible in evidence to make out a charge of robbery; nor, indeed, any other charge except those in which the death of the deceased person, by whom the declaration was made, is the subject of the inquiry." A citation of this class of cases is not necessary, as they are quite familiar and are not at all disputed. It only remains to consider the course of authority upon the very question now before us. It has never heretofore been before this court. But in England and several of the states it has been considered and determined, and the weight of authority seems to be quite decidedly against the admissibility of the evidence. Thus, in *Rex v. Hutchinson*, 2 Barn. & C., 608, note *a*, the prisoner was indicted for administering a drug to a woman pregnant but not quick with child, with intent to procure abortion. The woman was dead, and for the prosecution evidence of her dying declaration upon the subject was tendered. The court rejected the evidence, observing that,

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although the declaration might relate to the cause of the death, still such declarations were admissible in those cases alone where the death of the party was the subject of the inquiry.

In *Reg. v. Hind*, 8 Cox, Crim. Cas., 300, the defendant was indicted for using instruments upon a woman with intent to produce an abortion, in consequence of which she died. It was held that her dying declarations in relation to the offense were inadmissible. The same course was followed in the state of New York in the case of *People v. Davis*, 56 N. Y., 95, where the statute is quite similar to our own; the penalty being increased when the woman dies in consequence of the unlawful acts. It was held that the dying declarations of the woman were incompetent, on the general ground that the death was not the subject of the charge. In the case of *State v. Harper*, 35 Ohio St., 78, the same doctrine was held under a statute almost identical with ours. The chief justice said: "This was an indictment for unlawfully using an instrument with the intent of producing an abortion, and not an indictment for homicide. *State v. Barker*, 28 Ohio St., 583; *People v. Davis*, 56 N. Y., 96. The death was not the subject of the charge, and was alleged only as a consequence of the illegal act charged, which latter was the only subject of investigation. Did the court err in rejecting the dying declaration in proof of the charge? We think not. The general rule is that dying declarations are admissible only when the death of the declarant is the subject of the charge, and the circumstances of the death are the subject of the dying declaration. *Rex v. Mead*, 2 Barn. & C., 605; 1 Greenl. Ev., 156; *Rex v. Lloyd*, 4 Car. & P., 233."

On the other hand, the supreme court of Indiana has held that such declarations were admissible in an indictment under a similar statute. *Montgomery v. State*, reported in 3 Crim. Law Mag., 523. In *State v. Dickinson*, 41 Wis., 299, the declarations were admitted, but by the statute of that state the offense is expressly made manslaughter where the woman dies, and the case was therefore one of homicide and within the rule. The case in Indiana appears to be the only one in a court of last resort in which the declarations have been held admissible. After a careful examination of the opinion in that case, and

also of two other cases decided by courts of quarter sessions in our own state, we feel constrained to say that we think the better and safer rule is to limit the admissibility of dying declarations to cases of homicide only. We are, therefore, of opinion that the learned court below was in error in receiving the declarations of Annie Faust in this case, and for that reason the judgment must be reversed.

The second assignment is not sustained. The third, fourth and fifth become immaterial in consequence of our decision rejecting the declarations. The sixth and seventh assignments are to some extent justified by the language of the charge, but we do not feel disposed to reverse on them. The eighth assignment is not sustained, and the ninth does not set out any specific words of the charge, and does not appear to be justified by its general substance.

The judgment is reversed, and the record is remanded to the court below for further proceedings, together with this opinion, setting forth the causes of reversal.

NOTE.—After the cause was remanded to the lower court the district attorney having come to the conclusion that a conviction could not be had on the first bill of indictment, without the dying declarations could be put in evidence, presented a new bill to the grand jury at November term, 1885. This bill was drawn in theoyer and terminer, and charged the defendant with murder. It was returned as a true one, and contained three counts. The first was for murder by an assault upon the decedent, without detailing how it had been committed. The second alleged that the assault had been made by the use of instruments and in the attempt to procure an abortion, and the third that a like attempt had been made by injecting poisonous drugs into the person of the decedent and thus causing her death.

When the case was called for trial the district attorney was granted leave, against the protest of the defendant, to enter a *nolle prosequi* on the bill upon which he had been formerly tried.

A motion was then made on behalf of the defendant to quash the new indictment, accompanied by reasons which in substance were, that the bill, while charging murder, set forth an offense which had been differently designated in our Criminal Code, and for which a milder punishment was inflicted, and that he could not be proceeded against under an indictment at the common law.

In order that the question involved, to wit: Whether an indictment at common law for murder could be sustained for the offense for which the prisoner was charged, might be speedily and economically disposed of, the district attorney further asked and obtained leave to enter a *nolle prosequi* as to the first count in the new indictment, and it was also stipulated, as appears by the notes of the court, that the charge on which the second in-

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dictment was founded was the same for which the defendant had been tried and convicted at April sessions, 1894, and that the evidence which the commonwealth proposes to offer upon the trial of the case at present is virtually the same as was then submitted; and further, that in the consideration of the motion to quash, the court might consider the record and proceedings in the former case. Thus the court was enabled to dispose of the matter as if it were a demurrer by the defendant to the evidence offered on the part of the commonwealth, as well as upon the motion to quash.

After due consideration by the court of the reasons urged why judgment should not be entered against the defendant, the court sustained and adjudges them sufficient in law and judgment is thereupon entered in favor of the defendant.

The commonwealth thereupon took this writ, assigning for error the judgment of the court. The judgment of the supreme court in this writ of error is reported in 113 Pa. St., 37, and is as follows:

"MERCUR, C. J. In *Railing v. Com.*, 16 Weekly Notes Cas., 452; *S. C.*, 1 Atl. Rep., 314, the unlawful acts charged were presented under an indictment of another form. We reversed that judgment for error in admitting certain declarations in evidence. The indictment then charged the defendant with having administered a drug to Annie Faust with intent to produce a miscarriage, and that her death resulted as a consequence of so administering it. That indictment was framed under the eighty-seventh section of the Criminal Code of the 31st March, 1860. It declares if any person shall unlawfully administer to any woman, pregnant or quick with child, or supposed and believed to be so, any drug, poison or other substance whatsoever, or shall unlawfully use any instrument or other means whatsoever, with the intent to procure the miscarriage of such woman, and such woman, or any child with which she may be quick, shall die in consequence of either of said unlawful acts, the person so offending shall be guilty of felony, and shall be sentenced to pay a fine not exceeding \$500, and to undergo an imprisonment by separate or solitary confinement at labor not exceeding seven years. Section 183 of the same code declares, in all cases where a remedy is provided, or duty enjoined, or anything directed to be done, by any act or acts of assembly of this commonwealth, the directions of said acts shall be strictly pursued; and no penalty shall be inflicted or anything done agreeably to the provisions of the common law in such cases further than shall be necessary for carrying such act or acts into effect.

"Thus section 87 took the crime therein specified out of the class designated as murder, and made it a felony of lesser grade, and prescribed the punishment therefor. Hence no penalty therefor shall be inflicted, or anything be done in punishment thereof, otherwise than as directed by said section. The present attempt is to convict the defendant of murder, on a new indictment, for committing the same acts, on the same person, as charged in the former indictment. The punishment prescribed for the lowest grade of murder is imprisonment by separate or solitary confinement not exceeding twelve years, and for the second offense for the period of his natural life. Thus the statute not only makes the acts with which the defendant is charged an offense less than murder, but also prohibits as severe a punishment therefor. It may be urged that on an indictment for murder a conviction might be had of voluntary manslaughter. This is undoubtedly

true; but that does not help the case. The punishment prescribed for such a conviction is a fine not exceeding \$1,000, and imprisonment not exceeding twelve years. Thus the attempt to indict for murder, and punish as if murder the commission of the acts specified which the statute does not make murder, cannot be successful. It follows the learned judge committed no error in quashing the indictment. The conclusion at which we have arrived appears to be in accord with *Robbins v. State*, 8 Ohio St., 131, and *Com. v. Jackson*, 15 Gray (Mass.), 188.

"Judgment affirmed."

Under what circumstances as to when dying declarations are admissible, see *Reynolds v. The State*, 4 Am. Cr. R., 152, and *Payne v. The State*, id., 155, and note.

STATE V. THURMAN.

(66 Ia., 693.)

ABORTION: *Indictment.*

1. MURDER — INDICTMENT — REQUISITES — ABORTION — MALICE.—In an indictment for murder the killing must be charged as done with malice aforethought.
2. ABORTION — MALICE.—When drugs are administered and instruments thrust into the body of deceased with the specific intent to produce an abortion, these acts imply malice.

Appeal from Wayne District Court.

The indictment is for murder in the second degree, and charges that the defendant "did wilfully, maliciously and feloniously administer or cause to be taken by one Ella Vaughn, then and there being pregnant with child, a quantity of some noxious drug or substance, . . . with the specific intent then and there to produce a miscarriage and abortion of said Ella Vaughn, . . . from the effects of and by reason of said drugs so administered the said Ella died." In a second count it is charged that the abortion was produced by thrusting into the body of Ella Vaughn an instrument, and thereby her death was caused. The defendant, having been found guilty, filed a motion in arrest of judgment, on the ground that it did not appear that the acts causing the death were done with malice aforethought. The motion was overruled and judgment entered on the verdict, and the defendant appeals.

Freeland & Miles and *W. H. Tedford*, for appellant.

A. J. Baker, attorney-general, for the state.

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SEEVERS, J. The statute provides that whoever kills any human being with malice aforethought, either express or implied, is guilty of murder. Code, § 3848. The indictment must therefore charge that the killing was done with malice aforethought; but it is not essential that these identical words be used. It is sufficient if words of the same import are used; or if from the language used in the indictment it clearly appears that malice aforethought is charged, or can without doubt be implied, the indictment is sufficient. It is clearly charged that the drugs were administered, and the act of thrusting the instrument into the body was maliciously done. Now, does the indictment charge that the acts were done with malice aforethought; that is to say, does it sufficiently appear the defendant deliberated and thought before he did the act which caused the death? We think the indictment so charges. The drugs were administered and the instrument thrust into the body of the deceased with the specific intent to produce an abortion. This clearly implies previous thought and deliberation. Such an intent could not have been formed or have existed unless it had been contemplated and deliberated upon before the drugs were administered. The indictment in this case is not materially different from that in *State v. Neeley*, 20 Iowa, 108, which it was held was sufficient.

Affirmed.

LORD v. THE STATE.

(17 Neb., 526.)

ADULTERY: *Indictment — Wife as witness — Evidence.*

1. INDICTMENT FOR ADULTERY.—In an indictment under section 208 of the Criminal Code, against a husband, for deserting his wife and living and cohabiting with another woman in a state of adultery, the offense must be alleged substantially in the language of the statute.
2. WITNESS — WIFE COMPETENT.—The wife *held* to be a competent witness against her husband on his trial upon an indictment for adultery, under a statute permitting a husband or wife to testify in a criminal proceeding for a crime committed by one against the other.
3. MARRIAGE — EVIDENCE.—Marriage may be proved by an eye-witness, and if followed by cohabitation its validity will be presumed.

Error to the District Court for Brown County.

J. F. Burns and *D. A. Holmes*, for plaintiff in error.

William Luse, attorney-general, for the state.

MAXWELL, J. The plaintiff in error was convicted of adultery in the district court of Brown county, and sentenced to imprisonment in the county jail for the term of one year, and to pay a fine of \$200, and costs. But two errors are relied upon in the plaintiff's brief: *First*, that the indictment is insufficient; *second*, that the court erred in permitting the wife of the plaintiff in error to testify against him. The following is a copy of the indictment:

"THE STATE OF NEBRASKA, *Brown County*. Of the November term of the district court of the ninth judicial district of the state of Nebraska, within and for Brown county, in said state, in the year of our Lord 1883, the grand jurors chosen, selected and sworn, in and for the county of Brown, in the name and by the authority of the state of Nebraska, upon their oaths present: that Uriah W. Lord, late of the county aforesaid, on the 1st day of April, in the year of our Lord 1883, in the county of Brown and state of Nebraska, aforesaid, the said Uriah W. Lord being then and there a married man, to wit, being then and there married to one Hannah Lord, on the said 1st day of April, in the year aforesaid, and from said day continually until the 28th day of November, A. D. 1883, in the county of Brown, aforesaid, did unlawfully live and cohabit in a state of adultery with one Celia Amit, a female woman."

Section 203 of the Criminal Code provides that "if any married man shall hereafter commit adultery or desert his wife, and live and cohabit with another woman in a state of adultery, or if any married man living with his wife shall keep any other woman and wantonly cohabit with her in a state of adultery, . . . every person so offending shall be fined in any sum not exceeding \$200, and be imprisoned in the jail of the county not exceeding one year." It will be seen that the statute provides for three classes of cases: *First*, where a married man commits adultery; *second*, if he desert his wife, and live and cohabit with another woman in a state of adultery; *third*, if, living with his wife, he shall keep any other woman

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and wantonly cohabit with her in a state of adultery. This section is copied from the Criminal Code of Ohio, and the second and third provisions, as numbered above, seem to have been passed by the legislature of that state in 1831. Warren, *Crim. Law*, 607; Whart. *Crim. Law*, § 2646.

The indictment in this case is an attempt to charge an offense in the second class, viz., a married man deserting his wife and living in a state of adultery with another woman. To do this the charge should be, in substance, that the plaintiff, being then and there married to (name of wife), did then and there desert his wife, and thence continually for a space of time did live and cohabit with another woman (naming her) in a state of adultery, and that during such time the accused was a married man, and the person with whom he lived and cohabited was not his wife. A good form of indictment under this provision of the statute is found in Warren, *Crim. Law*, 615. The statute makes the desertion of the wife a part of the offense, and it should be charged. While it is the duty of the court to give words their ordinary meaning, and where the language of the statute is not used in charging the offense, but other words meaning the same thing, to sustain an indictment, yet there must be a distinct charge of an offense declared to be such by statute, and the court cannot supply by intendment material facts left out of the indictment. As the indictment is defective in some of these particulars, the motion to quash it should have been sustained.

2. Section 331 of the Civil Code provides that "the husband can in no case be a witness against the wife, nor the wife against the husband, except in a criminal proceeding for a crime committed by the one against the other, but they may in all criminal prosecutions be witnesses for each other." At common law a wife could not be a witness against her husband; and there is a direct conflict in the authorities, under statutes similar to ours, as to her right to be a witness in a criminal proceeding for a crime committed by her husband against her. This is the first time the question has been presented in this court, and it is therefore necessary to ascertain the intention of the legislature in passing the section above referred to, and give force to that intention. The statute makes it an offense for a husband to desert his wife and live and co-

habit with another woman. If the husband is prosecuted for the offense, the prosecution certainly would be a criminal proceeding for a crime committed against the wife. The word "crime" is frequently used to designate gross violations of law, in contradistinction from misdemeanors; but in its broad sense it means any violation of law. Webst. Dict., 312, 313. And in our view it was intended by the legislature to include the offense here charged, and the ends of justice will be best subserved by permitting the wife to testify. This is the rule adopted in Iowa under a similar statute. *State v. Bennett*, 31 Iowa, 24; *State v. Sloan*, 55 Iowa, 219; *State v. Hazen*, 39 Iowa, 648. In Texas, also. *Morrill v. State*, 5 Tex. Ct. App., 447; *Roland v. State*, 9 Tex. Ct. App., 277.

A third question arises out of the second, viz., the mode of proving the marriage. At common law, in trials for polygamy, adultery and criminal conversation, proof of marriage must be made by direct evidence or its equivalent. 2 Greenl. Ev., § 461; 1 Phil. Ev. (4th Amer. ed.), 631, 632. But, even at common law, proof of a marriage having been celebrated, by a person who was present, was sufficient. 1 Phil. Ev., 632; *Hemmings v. Smith*, 4 Doug., 33. Any person who was present when the marriage took place is a competent witness to prove the marriage; and it is enough that he is able to state that the marriage was celebrated according to the usual form, and he need not be able to state the words used. *Fleming v. People*, 27 N. Y., 329. In this state no proof of the official character of the person performing the ceremony is necessary, and his certificate or a copy of the record, duly certified, will be received in all courts and places as presumptive evidence of marriage. In the absence of evidence to the contrary, the statute of Pennsylvania will be presumed to be like our own. *Moses v. Comstock*, 4 Neb., 519; Story, Confl. Laws, § 637. The marriage was abundantly proved, and was followed by the parties living together as husband and wife for more than twelve years. They evidently regarded it as a valid marriage, and such we have no doubt, from the evidence before us, it was.

For the sole reason that the indictment is insufficient, the judgment of the district court is reversed, and the cause remanded for further proceedings.

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McLAIN v. THE STATE.

(18 Neb., 154.)

ALIBI: Confessions — Misconduct of prosecutor — Presumptions.

1. **ALIBI — BURDEN OF PROOF.**— When defendant introduces testimony tending to prove an *alibi*, the burden of proof to establish the same does not shift, and if upon all the evidence, including that for and against the *alibi*, there remains in the mind of the jurors a reasonable doubt as to the defendant's guilt, they must acquit.
2. **CONFESSIONS — INDUCEMENTS FOR.**— When no confession or admission of guilt has been made by a party on trial for a criminal offense, it is immaterial what inducements may have been held out to him for the purpose of obtaining a confession or admission of guilt.
3. **ABUSE OF ARGUMENT BY COUNSEL.**— Where the language used by the district attorney or assistant counsel, in opening a case or summing up to a jury, is deemed prejudicial to the accused, "the attention of the court should be called to it by proper objection, and a ruling had thereon. If the objection is overruled, and an exception taken, the question may be reviewed by the supreme court upon the language, objection, ruling and exception; but not otherwise."
4. **PRESUMPTIONS IN RESPECT TO POSSESSION OF PROPERTY RECENTLY STOLEN.**— It is not error on the part of the court to allow counsel for the state, in summing up to the jury, to comment upon the presumption of guilt arising from the possession by the accused of recently stolen goods, without explanation of such possession, even where counsel fail to state the law with technical accuracy.

Error to the District Court for Otoe County.

J. L. Mitchell and *J. C. Watson*, for plaintiff in error.

William Leese, attorney-general, for the state.

Comb, C. J. The plaintiff in error was indicted, tried, and convicted in the district court of Otoe county of the crime of grand larceny, in the stealing of a quantity of gold and silver watches, watch-cases and jewelry, the property of Alexander Calmelet. The cause having been brought to this court on error, the questions presented arise upon the sufficiency of the evidence, the admission of the testimony of the witness Dennis Kay, misconduct of the prosecuting attorneys, the refusal to charge, and the charge as given by the court. These questions will be discussed in the order in which they are presented in the brief of counsel.

¹ See note.

It appears from the bill of exceptions that the store of Mr. Calmelet is situated on Main, between Fifth and Sixth streets, Nebraska City, on the south side of the street. The store had two doors,—one front and one in the rear. On the afternoon of Saturday, the 5th day of April, 1884, at five minutes to 6 o'clock, Mr. Calmelet locked up his store and went to supper at the Morton House, a few blocks distant. He was absent from the store thirty-five minutes. When he returned he found that an entrance had been effected by removing a glass from the back window, reaching in and turning the key, which had been left in the back door, and drawing the bolt, and the watches, watch-cases and jewelry above mentioned taken. The matter was placed in the hands of the sheriff of the county, who, the next day, had printed a circular containing a description of the property stolen, and an offer of a reward for its return and the apprehension of the thief. Copies of this circular were mailed to sheriffs and police officers throughout the country, including the chief of police of Chicago. On the morning of the 14th day of the same month, the defendant was arrested in the shop of a pawnbroker in the city of Chicago by Dennis Kay, a police officer. At the time of his arrest he had in his possession and on his person a part of the watches, watch-cases and jewelry stolen as aforesaid, about half in value of the same. It further appears from the bill of exceptions that at the time of the breaking into the said store and larceny of said goods the defendant was in Nebraska City, and had been there for about two weeks; that during said time he took his meals at the restaurant of William Ince, and roomed in the Barnum House; that he was without any occupation, but claimed to be about to open a shooting gallery. There was also evidence tending to prove that he was without money. He continued to take his meals at Ince's restaurant until Friday, April 10th, when he disappeared, and was not seen there again, nor elsewhere in Nebraska City, until he was brought back after his arrest in Chicago.

The only evidence offered on the part of the defense (except of one witness) was that which tended to prove an *alibi*; and it cannot be denied that such evidence was very strong. Capt. Murfin, Mrs. William Ince, Nettie Knight and Richard

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Filbon all testified to facts in relation to the presence of defendant in the dining-room of Ince's restaurant between the hours of 5 and 7 o'clock on the evening of the larceny, which, if true,—and no doubt is cast upon the honesty or candor of either of the witnesses, and the clock in the dining-room indicated the correct time,—was sufficient to establish the impossibility of the defendant's being at the scene of the larceny at any time between five minutes before and thirty minutes after 6, the whole period of Mr. Calmelet's absence from the store, according to his testimony. But W. W. Brown, a witness on the part of the state, testified that he was on Main street diagonally opposite to, and across the street from, Calmelet's store on the evening in question, twenty minutes or a half an hour before he went to his supper at the Morton House, saw Calmelet come out of the store and pass up the street, and that shortly afterwards, and when witness had time to walk about three-fourths of a block, he met defendant and passed him on the sidewalk, diagonally, and on the opposite side of the street, from Calmelet's store; that defendant was alone, and looking in the direction of Calmelet's store. Witness testified that within twenty-five minutes or half an hour from the time of his meeting defendant on the sidewalk, as above stated, he heard at Reed's drug-store of the robbery of Calmelet's jewelry store. Witness testified that the time when he saw Mr. Calmelet come out of the jewelry store and pass up street was not earlier than five minutes before, nor later than five minutes after, 6 o'clock; and, though he was subjected to a searching cross-examination, none of his statements were in the least shaken. I have stated the substance of the testimony for and against the *alibi* for the purpose of introducing the instructions prayed by the defendant and refused by the court, which refusal is urged as error.

The instructions prayed were as follows: "(No. 6.) The jury are instructed that the burden lies on the state to prove the falsity of the defendant's *alibi* beyond a reasonable doubt." "(No. 9.) The jury are instructed that the presumption arising from the possession of stolen property is completely removed by the proof of an *alibi* for defendant." "(No. 10.) The court instructs the jury that while possession of stolen property recently after the theft, if unexplained, is a circumstance

tending to show the guilt of the possessor, still, in this case, if the jury believe from the evidence that the defendant, at the time of the commission of the larceny, was at the restaurant of William Ince, and not at the place of the said larceny, this is a satisfactory account of his possession of the property, and removes every presumption of guilt growing out of such possession."

The following instructions, bearing on the point of defendant's evidence tending to prove an *alibi*, were given:

"(4) It is a rule of evidence, in trials for the larceny of goods, that the finding of the stolen goods in the exclusive possession of the accused, very recently after the larceny was committed, is presumptive evidence that he stole them; and, in this case, if the goods mentioned in the indictment were stolen, and shortly after the larceny they, or a portion of them, were found in the exclusive possession of the accused, the presumption arising from such possession is that the defendant stole them. But the defendant having introduced evidence to show that he, at the time of the larceny, was at another place, and could not have perpetrated the crime, the burden still rests upon the prosecution to prove the defendant did commit said larceny, and is guilty beyond a reasonable doubt."

No. 1 of instructions given as prayed by defendant. "Where a person on trial for a crime shows that he was in another place at the time when the act was committed, he is said to prove an *alibi*."

"(2) One of the defenses interposed by the defendant in this case is what is known as an *alibi*,—that is, the defendant was at another place at the time of the commission of the crime; and the court instructs the jury that such defense is as proper and as legitimate, if proved, as any other, and all evidence bearing upon that point should be carefully considered by the jury; and if, in view of all the evidence, the jury have any reasonable doubt as to whether the defendant was in some other place when the crime was committed, they should give the defendant the benefit of the doubt and find him not guilty."

"(3) As regards the defense of an *alibi*, the jury are instructed that the defendant is not required to prove that defense beyond a reasonable doubt to entitle him to an acquittal. It is sufficient if the evidence upon that point raises a reason-

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able doubt of his presence at the time and place of the commission of the crime charged."

"(4) The court further instructs the jury that if they believe from the evidence that at the time of the alleged larceny, and at the hour that the crime was committed, the defendant McLain was at the restaurant of William Ince, as testified to by some of the defendant's witnesses, and was not present at the scene of such larceny at the time of its commission, then you must acquit the defendant."

"(5) The jury are instructed that if you entertain any reasonable doubt as to whether or not the defendant McLain was at Ince's restaurant, or at the scene of the larceny, Calmelet's store, at the time the larceny was committed, then it is your sworn duty under the law to give the benefit of the doubt to the defendant and acquit him."

"(7) The jury are instructed that if you should entertain a reasonable doubt as to the defendant's guilt he should be acquitted, although the jury might not be able to find that the *alibi* was fully proved."

"(8) The jury are instructed that the fact that the defendant may not be able to show how or where he acquired possession of the property alleged to have been stolen is by no means conclusive of his guilt, but merely raises a presumption of guilt, which he may rebut by proof that at the time of the commission of the offense he was some distance from the place of taking."

These instructions presented to the consideration of the jury the defendant's evidence of his *alibi* in a light as favorable to him as the law would justify the court in doing, and indeed I think the court went rather too far in that direction. The most that could be required was that the jury be told that the burden of proof did not shift to defendant upon the question of *alibi*; and that if, upon all the evidence, including that for and against the *alibi*, there was a reasonable doubt of his guilt, they must acquit him. This they were told in effect so often as to almost infringe upon the rule which forbids a court in instructing a jury to give undue prominence to particular facts, or a particular branch of the case. See *Campbell v. People*, 109 Ill., 565.

Plaintiff in error, in the brief of counsel, also makes a point

upon the giving of No. 5 of instructions given on behalf of the state, which is as follows: "(No. 5.) If the evidence satisfies you that said goods were stolen, then, in passing upon the question of the defendant's guilt or innocence, you should consider the evidence as to the goods having been found in the possession of the defendant, as well as the evidence as to defendant's opportunity or want of opportunity to commit larceny, his conduct at or about the time of the larceny, and prior and subsequent thereto, and what, if anything, he may have said respecting the larceny, as well as all the attending circumstances, as shown by the evidence admitted in the case." Counsel do not point out in what respect the giving of this instruction was prejudicial to the plaintiff in error, nor do I perceive in what light it can be held to be error, much less prejudicial error.

A considerable part of the brief of counsel is devoted to a discussion of the question of the admissibility of confessions made by the accused while under arrest, and induced by those having him in arrest, by threats of punishment or promises of favor. While I am inclined to agree with counsel in the main in what they say as to the law on that subject, I am unable to see its applicability to the case at bar. Certainly no witness has testified to any confession made by the accused. The giving of information by him by means of which one of the stolen articles was found cannot be regarded as a confession of guilt, and it is very clear from the whole case that it was not so intended. Neither does it appear that the police officers sought to elicit a confession of guilt from him that would secure his conviction. They did seek to induce him to divulge facts which might lead to their securing the balance of the stolen property, and probably of his associates in the crime, yet with but little success. The watch and chain which he had pawned in Chicago he knew they would find anyhow, so he gave the name of the shop where it might be found; but as to what had become of the balance of the plunder, or who had assisted him in the commission of the robbery and shared in its fruits with him, or, indeed, that he had any part in its commission or received the goods from some other party knowing that they had been stolen or otherwise, he made no sign.

It appears from the bill of exceptions that, in opening the

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case to the jury on the part of the state, Mr. Strode, district attorney, as a part of his remarks, referring to the apprehension of the defendant, used the following language: "The policeman knew his reputation to be that of a common thief." Upon the attention of the court being called to these remarks by the counsel for defendant, the court admonished the district attorney that he "should not say that;" and upon counsel for defendant demanding the court to instruct the district attorney "that it is improper to state what this man's reputation was," and said, "We object to anything as to this man's character or reputation being said," the court said: "You cannot prove that in the first instance, I suppose. Till they show good character you cannot prove bad character." Whereupon the district attorney said, "I will desist from commenting."

Again, in his closing remarks, in summing up to the jury, the district attorney used the following language: "I trust the jury will do what is right, and I will be satisfied, and the people will be satisfied; but if you acquit there is no appeal for the state,—that ends it, as far as the state is concerned; while, if you convict and an injustice is done, the defendant has a right to appeal to the supreme court, who, if it is wrong, will reverse the case and give him a new trial." Whereupon counsel for defendant said: "I ask that that be taken down, and we except to it."

Also, it appears that Hon. F. T. Ransom, who assisted the district attorney, and who also summed up on the part of the state, in the course of his speech said, while commenting on the testimony of the witness Dennis Kay, who arrested the defendant in Chicago: "He suspected there was some crooked work, because he knew him to be an old thief." Upon the attention of the court being called to these remarks, and objection made to them by counsel for defendant, Mr. Ransom claimed that he was commenting on the testimony. Counsel for defendant asked that the notes of the reporter be read, which was done, and it was found that the testimony of the witness Kay as to the defendant being an old thief had been stricken out; whereupon counsel for defendant asked the court to instruct the jury that what counsel had said should have no weight with them, and asked the court to instruct counsel not to refer to that any

more, for it is not evidence, and it is improper to do so; which, according to the bill of exceptions, "is accordingly done."

Again, in the course of his remarks, Mr. Ransom said, "He has not called any witness here, nor accounted for the property." *Watson*: "I object to counsel stating anything of that kind,—not accounting for the property." *Ransom*: "I say that a person found with stolen property in his possession is bound to account for it, so as to change the burden of proof."

Watson: "I object." (Objection overruled, and defendant excepted.)

The above is claimed to be misconduct on the part of the district attorney and assistant counsel, and a reversal of the judgment is claimed for that reason.

Similar questions have often come before this court, and its rulings have been almost, if not quite, uniform upon them. The case of *Bradshaw v. State*, 17 Neb., 147, is quite in point as to all objections of this character, in the case at bar, except the last objection raised to the remarks of assistant counsel Ransom. In that case, in the opinion by Judge Reese, the court say: "The supreme court, in the exercise of its appellate jurisdiction in cases of this kind, is limited to the correction of the error of the district court. Before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind the attention of the trial court must be challenged by a proper objection to the language, and a ruling upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted by a bill of exceptions, showing the language used, the objection, ruling of the court, and exceptions to the ruling can be presented to this court for decision. If the court sustains the objection, and thus condemns the language, and requires the attorney to desist, and confine himself to the evidence in the case, no injury is suffered by the accused."

In the matters which we are now considering there was but one ruling of the court adverse to the defendant. In that the

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court sustained assistant counsel Ransom in stating to the jury, "He has not called any witness here, nor accounted for the property;" and "I say that a person found with stolen property in his possession is bound to account for it, so as to change the burden of proof." The first proposition was one of fact. If counsel should be understood as meaning that the accused had called no witness to testify for him at the trial, the statement was not true in point of fact, for he had called several. But such could not have been the intent of the language, but rather that the defendant had called no witness to testify as to how he came into the possession of the goods. In this sense it was true, and I think legitimate matter to call the attention of the jury to. The other words used by him, while not stating the proposition as fully and clearly as would be required in an instruction by a court to a jury, yet did state the law substantially correct, and as nearly technically so as should be required in a forensic address. There can be no doubt, as a general proposition of law, that the exclusive possession of goods recently stolen is sufficient to put an accused person upon his defense. The remarks of counsel in summing up must be construed in reference to the evidence in the case in hand, and in that view, I think, they were unobjectionable.

The only remaining point to be examined is that numbered 6 in the petition in error, "that the verdict is not sustained by sufficient evidence, and is contrary to law." It is not questioned that the goods described in the indictment were stolen at the time and place therein stated, nor that at that time the accused was boarding at one place and rooming at another, all within a block or two of the scene of the larceny. It is in proof on both sides that, as early as the next morning after the larceny, the plaintiff in error knew that he was suspected of having committed it. One of his own witnesses testified that on the next Friday, six days after the larceny, he disappeared from his boarding-house without notice of his intended departure, and three days from that time the plaintiff in error was arrested in a pawn-shop in Chicago, four hundred miles away, with about half of the stolen property on his person, having already pawned a valuable gold watch and chain, part of said stolen property, for some \$10 or \$15.

There was also evidence tending to prove that at the time of the larceny the defendant had been in Nebraska City for about two weeks, without occupation or visible means of support; that he was talking of building and operating a shooting gallery, but was unable to raise the sum of \$5, required by the carpenter as advance payment, before commencing the work.

The only defense sought to be made by the accused was that of *alibi*; that at the time, to wit, between five minutes before 6 o'clock and thirty minutes after 6 of the afternoon of Saturday, the 5th day of April, 1884, he was all the time in the dining-room of William Ince's restaurant. This is sworn to by four witnesses, and it seems to me that while this defense rested entirely upon the accuracy of the restaurant clock, and the fact that it had not been tampered with on the evening in question, yet, those two propositions granted, the *alibi* was as fully proven as well could be. Yet there was conflicting evidence. One witness who carried a watch, and had occasion to consult it with reference to taking his wife to supper at the hotel, and did consult his watch at the very time in question, swears positively to having seen the accused on the street near the scene of the larceny about the time when the larceny must have been committed, at the time when the other four witnesses swear to his having been on the sofa playing with Mrs. Ince's children in the restaurant. In such cases it is the province of the jury, and always a disagreeable and unwelcome duty, to decide which statement is the truth. And in arriving at this decision many other things beside the relative number of witnesses on either side may be considered by them; and when their finding follows the consistent evidence of one intelligent and unimpeached witness, it cannot be said to be unsustained by the evidence.

In passing upon the prisoner's defense of *alibi*, I think the jury had the right to consider all the evidence in the case; that of the finding of a part of the stolen property on the person of the accused in a shop where stolen property of that description is usually disposed of, in a distant city, nine days after the robbery, as well as that confined to his actual presence at the restaurant on the one hand, or on the street near the scene of the larceny on the other, near the precise point of time when the larceny must have been committed. And, looking at the

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whole of the evidence, I think that the verdict is not only sustained by the evidence, but for the jury to have found otherwise would have been to ignore both reason and the teachings of experience.

The judgment of the district court is affirmed.

Judgment affirmed.

(The other judges concur.)

NOTE.— *Presumption of guilt* arising from the possession of property recently stolen, see *State v. Shaffer*, 4 Am. Cr. R., 83 and note.

Alibi.— The rule announced by the supreme court of Nebraska in the above case is a fair exposition of the law relative to *alibi*. See, also, *Walters v. The State*, 4 Am. Cr. R., 33 and note.

PEOPLE v. MURRAY ET AL.

(57 Mich., 396.)

AIDING PRISONER: *Information — Ordinance.*

1. AIDING ESCAPE OF PARTY UNDER ARREST.— An information for aiding a party under arrest to escape need not allege that the respondent had knowledge of the arrest, or that the party was in custody, or that respondent did the act charged with an intent to aid the escape.
2. Charging the offense laid in the information substantially in the language of the statute, accompanying it with a statement of the facts upon which it arose, is sufficient.
3. FORM OF ORDINANCE.— To omit from an ordinance the words, "the common council of Port Huron do ordain," does not render it void.

Exceptions before judgment from St. Clair.

Moses Taggart, attorney-general, for the people.

Chadwick & Cline, for respondents.

SHERWOOD, J. The respondents in this case were charged and convicted in the St. Clair circuit for aiding one Nettie Russell to escape, who was arrested and alleged to have been in the lawful custody of the chief of police, on a warrant issued under an ordinance of the city of Port Huron, charging her and others with being disorderly persons. The information does not, in express terms, allege that the respondents knew of the arrest of the party charged, or that she was in custody, or that the respondents did the criminal act charged with an in-

tent to aid her escape. It is claimed by respondents' counsel these things should be averred in the information, and without such averments the information is fatally defective. We do not agree with counsel upon this point. The statute says: "Every person who shall aid or assist any prisoner in escaping or attempting to escape from any officer or person who shall have the lawful custody of such prisoner shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding \$500." How. St., § 9246.

The offense contained in the information is charged substantially in the language of the statute, and when this is done, accompanied by a statement of the facts out of which the offense arose, we think the information should be held sufficient. Any other thing necessary to be proved, in order to convict, although not stated in express language in the information, must be regarded as necessarily implied, and we do not think the information objectionable upon this ground. Respondent claims that no arrest was proved, or, if an arrest was proved, no continued custody of the prisoner was shown, and that particularly was this true at the time the offense charged in this information is alleged to have been committed. There was testimony tending to prove both the facts as charged, and, so far as we can discover, it was quite sufficient. In any event, it is enough to say that the jury found against the prisoner upon this subject, and we cannot disturb that finding.

The third objection is that the ordinance under which the arrest was made was prefaced as follows: "An ordinance to restrain and prevent disorderly houses and houses of ill-fame." Respondent claims this should have been followed with the words, "the common council of the city of Port Huron ordain," and that the non-compliance with the statute in this respect rendered the ordinance void. Local Acts 1877, p. 213, § 17. We find no such consequences attached to the neglect to comply with the statute in this regard, contained in any of its provisions, and we do not feel called upon, in the absence of any authority warranting such a construction, to apply the rule contended for in such a case as this.

The evidence produced upon the trial showing the by-law or ordinance properly adopted was the record of the proceedings of the common council of the city of Port Huron, con-

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taining the record of ordinances passed by that body, from which it appears the ordinance in question was unanimously adopted, and the proper publication thereof made. We think the rulings of the court, and the charge to the jury upon this point, were correct.

Upon the other questions raised upon the trial, and asked to have reviewed in this court, we have failed to discover any error, and the judgment must be affirmed.

(The other justices concurred.)

STATE v. PRICE.

(37 La. Ann., 215.)

ARSON: *Practice—Presence of prisoner—Grand jury—Evidence—New trial—Jurors not permitted to impeach verdict—Indictment.*

1. ONE MENTION IN RECORD OF PRISONER'S PRESENCE.—Where the trial occupied but one day and was continuous and uninterrupted, one mention of the prisoner's presence in court is enough.
2. OBJECTION TO ORGANIZATION OF GRAND JURY.—An objection to the organization of the grand jury that found the bill cannot be made for the first time in the appellate court. It is not necessary that the proceedings relative to their selection shall be in the record of appeal, unless specific objection had been made in the trial court thereto. Where no objection has been made below, it is sufficient if it appear that the grand jury came into court and presented the bill.
3. OBJECTIONS TO EVIDENCE MUST BE MADE WHEN OFFERED.—Objections to the reception of testimony cannot be made in an assignment of errors. They must be made on the trial, and bills of exception taken to the ruling thereon.
4. ABILITY TO PROVE FALSE SWEARING NOT GROUND FOR NEW TRIAL UNLESS DILIGENCE SHOWN.—A new trial is not grantable for alleged ability to prove false swearing of a witness, when no attempt was made to obtain testimony to support such allegation and no diligence is shown.
5. JURYMEN ARE NOT PERMITTED TO IMPEACH THEIR OWN VERDICT.—Public decency and public policy alike forbid that jurymen who have sworn to render a true verdict shall be permitted to swear that they rendered a false one.
6. IN AN INDICTMENT FOR ARSON it is not necessary to charge the house was set on fire with malice aforethought, but merely "wilfully and maliciously," nor does it vitiate the indictment that the copulative is used when the statute has wilfully or maliciously.

Appeal from the Twenty-second District Court, Parish of St. James. Duffel, J.

M. J. Cunningham, attorney-general, and *J. L. Gaudet*, district attorney, for the state, appellee.

Robt. G. Dague, for defendant and appellant.

MANNING, J. The defendant was convicted of arson and sentenced to hard labor for life. There are four grounds in his assignment of errors:

1. It does not appear that he was present in court during a considerable part of the trial.

If the prisoner's counsel has not read the record he should not undertake to represent him. If he has read the record he should not have made the above assertion. The record affirmatively shows the presence of the prisoner in court at every stage of the trial both important and unimportant.

2. It does not appear that he was present when the verdict was rendered.

The fact of his presence is expressly stated. The trial was a continuous and uninterrupted act, begun and concluded on one day. Besides the express mention of the prisoner's presence, with which the trial opens, the record of that day's proceedings closes with the entry that the prisoner was remanded to jail. The first mention of the presence was enough.

3. That the grand jury which found the bill was organized at a term for civil causes for which no jury had been provided, and not a jury term.

The objection comes too late even if it be well founded. It should have been made on the first day of the term. It was not made below at all, but for the first time here. *State v. Daniels*, 30 Ann., 91; *State v. Johnson*, id., 368; *State v. Watson*, id., 379; *State v. Coudier*, 36 Ann., 291.

4. It does not appear how the jurymen were obtained from whom the grand jury was selected.

If by this the prisoner means that the whole of the proceedings relative to the selection of the grand jury that found the bill should be in the record, he is in error. It is sufficient if it appear that the grand jury came into court and presented the indictment they had found, unless specific objection is made to its organization, when such objection and the proof in

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support of it will appear. The reason why it does not appear here is that no objection was made to the organization of the grand jury at the proper time, and no valid objection can be made by an assignment of errors in this court. *State v. Tazewell*, 30 Ann., 884.

The motion for a new trial contains six grounds:

1. That the verdict is contrary to the law and the evidence, which is nothing more than the formal allegation in such motions.

2. Objection is made to the testimony of the witnesses who identified certain articles found at the place of the fire as belonging to the accused, on the ground that the articles should have been produced.

This should have been made on the trial and a bill of exceptions taken to its reception. It cannot be made after trial, when the accused has waived objections by not making them and taken his chance of acquittal. Wharton, Crim. Pr. and Pl., §§ 801, 844, 877.

3. This presents a question of fact, pure and simple, viz., the discrepancy between the evidence of two witnesses on the trial and their evidence on the preliminary examination, and is not reviewable by this court.

4. The alleged falsity of a witness for the state and the ability of the prisoner so to have proved.

No attempt was made to obtain the witness who would have disproved the testimony of the state's witness. No diligence whatever is shown, and the brief for the state informs us she lived but a short distance from the court-house.

5. Misconduct of the jury in conversing with others during a recess of court at mid-day, and examining law books and papers at that time.

Defendant's own witness, introduced to support this ground, fails to do so. He says he "does not remember to have seen any member of the jury refer to any law books or papers during the recess," and he does not remember to have seen any persons inside the railing where the jury-box was. The sheriff and his deputy, one or the other having been with the jury in charge during the whole recess, swear positively that there was no communication with others and no law books or papers were touched.

6. This ground is thus stated: "several members of the jury, immediately or shortly after their discharge, openly stigmatized the verdict as iniquitous and stated they were convinced of the defendant's innocence," and proceeds to detail what took place in the jury-room, and how the jurymen who were convinced of the defendant's innocence were induced to forswear and join in a verdict of guilty. Six jurymen were offered to be sworn to prove these allegations.

The judge properly refused to hear them. The rule is of universal acceptance that jurymen will not be permitted to impeach their own verdict and thus declare their own perjury, for one oath would but offset the other. Both public decency and public policy alike demand the rejection of such testimony. *State v. Caldwell*, 3 Ann., 435; *State v. Brette*, 6 Ann., 653; *State v. Mellican*, 15 Ann., 557.

An offer was then made to prove by others that these jurymen had made these assertions to them, and this was also refused, for that would have been receiving at second-hand the impeachment of the verdict by the jurymen who had rendered it, and if they cannot be heard to impeach it by their own testimony, much less can their declarations be received when filtered through the repetition of third persons.

Finally a motion in arrest of judgment was made on ten grounds, that the indictment does not charge that at the time of setting fire to the house a human being was usually residing there, nor who was living in it, nor that a human being was lodging in it at night, nor that the crime was committed with malice aforethought, and such like.

The words of the statute are, "whoever shall wilfully or maliciously set fire to, or burn in the night-time any house . . . in which there shall be at the time some human being usually staying, lodging or residing at night," etc. R. S., sec. 841.

The indictment follows the words of the statute except that it charges the act to have been done feloniously, wilfully and maliciously. It does charge that a human being was living in the house and gives her name, and charges that she usually lodged therein at night. There was no need to insert the words "with malice aforethought." The use of the copulative "wilfully *and* maliciously," when the statute has "*or*," does

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not vitiate it. If it be criminal to burn a dwelling-house either wilfully or maliciously, it intensifies the criminality to burn it wilfully and maliciously. *State v. Banton*, 4 Ann., 31. Even in statutory offenses it is not necessary to follow the exact words of the statute, but is sufficient if the offense is set forth with substantial accuracy. *State v. Smith*, 5 Ann., 341; *State v. Ely*, 35 Ann., 895.

Judgment affirmed.

CHAPMAN v. THE STATE.

(78 Ala., 463.)

ASSAULT: *What is.*

WHAT CONSTITUTES ASSAULT.—Presenting and aiming an unloaded gun at a person within shooting distance, in such manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a civil action for damages.

From the Circuit Court of Barbour. Tried before the Hon. H. D. Clayton.

H. D. Clayton, Jr., for the appellant.

Thos. N. McTellan, attorney-general, for the state.

SOMERVILLE, J. The defendant was indicted for an assault and battery upon the person of one McLeod, and was convicted of a mere assault.

It may be that, if the indictment had been for robbery, the facts in evidence would have sustained the allegation of an assault, which, in cases of that nature, is often merely constructive; for every attempt at robbery, or to commit rape, or to do other like personal injury, involves within it the idea of an assault, either actual or constructive.

The present conviction, however, can be sustained only on the theory that it was an assault for the defendant to present or aim an unloaded gun at the person charged to be assaulted, in such a menacing manner as to terrify him, and within such distance as to have been dangerous had the weapon been loaded and discharged. On this question the adjudged cases,

both in this country and England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care on more occasions than the present; and we are of the opinion that the better view is that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on the subject is greatly attributable to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's "right to live in society without being put in fear of personal harm;" and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson v. Haffner*, 26 Amer. Rep., 81; Cooley on Torts, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence. *State v. Davis*, 1 Ired. Law, 125; *S. C.*, 35 Amer. Dec., 735. The approved definition of an assault involves the idea of an inchoate violence to the person of another, with the present means of carrying the intent into effect. 2 Greenl. Ev., sec. 82; Roscoe's Cr. Ev. (7th ed.), 296; *People v. Lilley*, 43 Mich., 521. Most of our decisions recognize the old view of the text-books that there can be no criminal assault without a present intention, as well as present ability, of using some violence against the person of another. 1 Russ. Cr. (9th ed.), 1019; *State v. Blackwell*, 9 Ala., 79; *Johnson v. State*, 43 Ala., 354. In *Lawson v. State*, 30 Ala., 14, it was said that, "to constitute an assault, there must be the commencement of an act, which, if not prevented, would produce a battery." The case of *Balkum v. The State*, 40 Ala., 671, which was decided by a divided court, probably does not harmonize with the foregoing decisions.

It is true that some of the modern text-writers define an assault as an *apparent* attempt by violence to do corporal hurt to another, thus ignoring entirely all question of any criminal intent on the part of the perpetrator. 1 Whart. Cr. Ev., sec. 603; 2 Bish. Cr. Law, sec. 32. The true test cannot be the mere tendency of an act to produce a breach of the peace; for opprobri-

ous language or abusive unqualified injury to sorting t such app may be a son who upon app which to ence, in r tagonist i shoot, pr stances ha loaded gu the other out inten though th action fo cannot be creating assaulted, a fore, enti And one Taplin's 1780, and the other spirit of d following Cr. Law are fully sec. 788, Russell, C *Reg. v. J McKay* 735.

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ous language has this tendency, and no words, however violent or abusive, can, at common law, constitute an assault. It is unquestionably true that an apparent attempt to do corporal injury to another may often justify the latter in promptly resorting to measures of self-defense. But this is not because such apparent attempt is itself a breach of the peace, for it may be an act entirely innocent. It is rather because the person who supposes himself to be assaulted has a right to act upon appearances, where they create reasonable grounds from which to apprehend imminent peril. There can be no difference, in reason, between presenting an unloaded gun at an antagonist in an affray, and presenting a walking-cane as if to shoot, provided he honestly believes, and from the circumstances has reasonable ground to believe, that the cane was a loaded gun. Each act is a mere menace, the one equally with the other; and mere menaces, whether by words or acts, without intent or ability to injure, are not punishable crimes, although they may often constitute sufficient ground for a civil action for damages. The test, moreover, in criminal cases, cannot be the mere fact of unlawfully putting one in fear or creating alarm in the mind; for one may obviously be assaulted, although in complete ignorance of the fact, and, therefore, entirely free from alarm. *People v. Lilley*, 43 Mich., 525. And one may be put in fear under pretense of begging, as in Taplin's case, occurring during the riots in London, decided in 1780, and reported in 2 East, P. C., 712, and cited in many of the other old authorities. These views are sustained by the spirit of our own adjudged cases, cited above, as well as by the following authorities, which are directly in point: 2 Greenl. Cr. Law Rep., and note, on pp. 271-275, where all the cases are fully reviewed; 2 Addison on Torts (Wood's ed., 1881), sec. 788, note 1, pp. 4-7; Roscoe's Crim. Ev. (7th ed.), 296; 1 Russell, Cr. (9th ed.), 1020; *Blake v. Barnard*, 9 C. & P., 626; *Reg. v. James*, 1 C. & P., 530; *Robinson v. State*, 31 Tex., 170; *McKay v. State*, 44 Tex., 43; *State v. Davis*, 35 Amer. Dec., 735.

The opposite view is sustained by the following authors and adjudged cases: 1 Bish. Cr. Law (7th ed.), sec. 32; 1 Whart. Cr. Law (9th ed.), secs. 182, 603; *Reg. v. St. George*, 9 C. & P., 483; *Com. v. White*, 110 Mass., 407; *State v. Shepard*, 10 Iowa, 126;

State v. Smith, 2 Humph., 457. See, also, 3 Greenl. Ev. (14th ed.), sec. 59, note *b*; 1 Arch. Cr. Pr. & Pl. (Pomeroy's ed.), 282-283, 907; *State v. Benedict*, 11 Vt., 238; *State v. Neely*, 74 N. C., 425.

The rulings of the court were opposed to these views; and the judgment must therefore be reversed, and the cause remanded.

NOTE.—Assault and battery.—An assault committed by striking with a pistol is, under the law of Texas (Penal Code, arts. 46, 490), simply assault, notwithstanding the person assaulted was wounded by the accidental discharge of the pistol used in the assault, unless it is shown that a pistol was, when used in such a manner, a deadly weapon; or that by means of such use of it serious bodily injury had been inflicted; or that the assault was committed with premeditated design and by the use of means calculated to inflict great bodily injury. *Pierce v. The State*, 21 Tex. Ct. App., 540.

It is not an assault for a man to take hold of a woman's hand, and put his arm around her shoulder, unless he did so without her consent, or with an intent to injure her, according to the decision in *Crawford v. The State*, 21 Tex. Ct. App., 485.

Right of one farming on shares to enter premises.—In the trial of an indictment for assault, when it appears there was a verbal lease between one of the defendants and the complaining witness, under which there was to be a division of the crops grown by the latter; that the defendants had entered upon the premises and demanded that a division should be made; and that thereupon the complaining witness, having resisted by force any division at that time, a quarrel arose, and the assault was committed, as the defendants allege, in self-defense,—the terms of the verbal lease, the defendants' right to enter upon the premises for the purpose of effecting a division, and the extent to which the complaining witness would be justified in using force to resist them, ought to be left to the jury under proper instructions. *The State v. Forsythe*, 89 Mo., 667.

Evidence.—Quarrel forming commencement of dispute.—In such a case, evidence of a quarrel which took place between the complaining witness and one of the defendants, in which the complaining witness charged the defendant with having accused his wife of having stolen part of the crop, is admissible as being the beginning, and therefore a part, of the quarrel; and also, malice aforethought having been made part of the issue, as tending to show the state of feeling between the parties. *Id.*

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STATE v. AMADON.¹

(58 Vt., 524.)

ASSAULT WITH DANGEROUS WEAPON: *Indictment—Amendment.*

INDICTMENT—CONCLUSION—AMENDMENT.—When an indictment contains two counts charging the same crime, one ending with and the other without the words “contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state,” the defective count may be amended by adding those words, as such conclusion is matter of form and not of substance, although the constitution requires all indictments to conclude with the words “against the peace and dignity of the state.”

Exceptions from Lamoille County.

Indictment for assault with a dangerous weapon. The state's attorney, before trial, moved to amend the indictment by adding to the first count the words “contrary to the form of the statute,” etc. The court, Powers, J., presiding, allowed the amendment, and the respondent excepted.

H. M. McFarland, for the state.

W. Brigham, for respondent.

Ross, J. The respondent excepted to the allowance by the county court of an amendment to the first count of the indictment by adding, at its close, the words “contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state.” The indictment is for an assault with a dangerous weapon, and contains two counts. The second count closes with the words allowed to be added to the first count. The counsel for the respondent contends that the amendment was one of substance, and for that reason beyond the jurisdiction of the county court to allow; and he bases his contention upon section 32 of the constitution of the state, which declares: “*All indictments shall conclude with these words, ‘against the peace and dignity of the state.’*” He insists that what the constitution declares that an indictment shall contain is a matter of substance. Suppose this contention is conceded. Does not this indictment close with the very words prescribed? The indictment does not close at the end of the first count thereof. That count ends in

¹See note.

the middle of the indictment. The two counts taken together form the indictment. As the indictment closes with the very words prescribed by the constitution, the contention upon that basis is without support or foundation. In indictments matters of form may be amended; matters of substance may not be. It may be difficult to express in exact language that will be applicable to every case, what constitutes the substance of an indictment, and what is merely formal. In general, I think, it may be laid down that the statement of every fact necessary to be proven to make the act complained of a crime is matter of substance in an indictment, and that all beyond—the order of arrangement, the precise words (unless particular words alone will convey the proper meaning)—is formal.

Says Judge Barrett, in *State v. Arnold*, 50 Vt., 731: "It is obvious, without illustration, that a defect that does not affect the merits of the case, or the evidence necessary to be given to maintain the indictment, can be regarded as only formal." Says Lord Chief Justice De Grey, in *Ree v. Horne*, Cowp., 672, and adopted by Mr. Chitty in volume 1, p. 213, of his work on Pleadings: "The charge must contain such a description of the crime that the defendant may know what crime it is which he is called upon to answer; that the jury may appear to be warranted in their conclusion of 'guilty' or 'not guilty' upon the premises delivered to them; and that the court may see such a definite crime that they may apply the punishment which the law prescribes." Again, says the Lord Chief Justice De Grey: "As to the *matter* to be charged, whatever circumstances are necessary to constitute the crime imputed must be set out, and all beyond are surplusage." Mr. Chitty concludes, page 214: "Hence the science of special pleading may be considered under two heads: (1) The *facts* necessary to be stated; and (2) the *form* of the statement." The jury cannot take cognizance of a fact necessary to constitute a crime unless it appears upon the record in proper averment, or an averment that is traversable and capable of being proved or disproved. It has not been and cannot be seriously contended that the words allowed to be added to the first count of the indictment by the county court contain an averment of any fact necessary to constitute the crime charged (an assault), or that was required to be proved or disproved to establish the crime charged,

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or to defend against the same. We conclude, therefore, that the amendment allowed was not matter of substance, but matter of form, and within the jurisdiction of the county court to allow.

The judgment is that the respondent takes nothing by his exceptions, and the cause is remanded.

NOTE.—In *Strong v. State*, 105 Ind., 1, in regard to the power of the circuit court on appeal to authorize an amendment to a complaint filed before a justice of the peace, the court say:

"We do not regard the paper filed as above, and purporting to amend the affidavit in certain respects, as amounting to an actual amendment of that document. The amendments which the prosecuting attorney evidently intended to make were such as could only have been made, if at all under our practice, by an interlineation of and swearing anew to the original affidavit, or by the substitution of a new affidavit in its stead. The question of the power of a circuit court to authorize the affidavit to be amended, in a case like this, is not, therefore, now properly before us. It may not, nevertheless, be out of place to remark that if a circuit court possesses such a power, which we regard as exceedingly doubtful, it inheres in the court, and rests upon general principles. Since section 1735, Revised Statutes 1881, cited by counsel, plainly has reference to another class of cases, consequently this case must now be considered as having been tried, and as still standing, upon the original affidavit. On the subject of the amendment of affidavits and verified complaints, filed before justices of the peace, see *Moore, Crim. Law*, § 84, and authorities cited; 1 *Bish. Crim. Proc.*, §§ 234, 714-721; *Bassett, Crim. Plead.*, 131, 132."

On appeal to the circuit court from a conviction of assault, the court may allow the complaint and warrant to be amended by inserting the true name of the complaining witness who was assaulted. *Rasmussen v. State*, 63 Wis., 1.

See *Ex parte Bain*, reported in this volume under "constitutional law," a case recently decided by the United States supreme court, which announces the true rule with reference to the lack of power in the court or prosecuting officer to amend an indictment.

STATE v. SMITH.

(11 Or., 205.)

ASSAULT ON OFFICER, ETC.: *Indictment—Shackling prisoner—Error.*

1. MURDER—ASSAULT ON OFFICER.—An indictment under the Code (Oregon), § 677, for assaulting an officer with a deadly weapon, must set out that the accused knew that the person assaulted was an officer.
2. SHACKLING PRISONER.—It is error to keep the prisoner in fetters during the trial.

Appeal from Marion County.

Bonham & Ramsey, W. G. Piper and S. F. Chadwick, for appellant.

W. H. Holmes, district attorney, for respondent.

WALDO, J. The appellant, William Smith, a prisoner in the state penitentiary, was indicted under section 677 of the Criminal Code, for assaulting with a deadly weapon and wounding George Collins, an officer of the penitentiary, having the charge and custody of the prisoner. The appellant was tried, found guilty, and sentenced to death. Several errors are relied on to reverse the sentence; two of which are, that the indictment was insufficient in that it did not allege that the prisoner knew Collins to be an officer, and that the prisoner was kept with irons on his feet during the trial,—a motion of the prisoner's counsel to have the irons removed being overruled on the ground that the irons were "put on the defendant at the penitentiary and could not be removed without much delay, and it would require the work of a blacksmith to remove them," to which ruling the prisoner's counsel excepted.

The sentence must be reversed on both grounds. An indictment must be so drawn as to exclude any assumption that the indictment may be proved and the defendant still be innocent. *State v. Melville*, 11 R. I., 418. To constitute the precise offense charged, the court deemed the rule to be deduced from the authorities to be that the prisoner must have known Collins to be an officer of the penitentiary. 2 Bish. Crim. Law § 51; Bish. St. Cr., § 664; *Com. v. Kirby*, 2 Cush., 581; *Horan v. The State*, 7 Tex. App., 183; *The State v. Downer*, 8 Vt., 424.

On the second point, that it was error to keep the prisoner in fetters during the trial, the opinion in the case of *The State of Missouri v. King*, 1 Mo. App., 438, leaves nothing further to be said. The case was affirmed on appeal. 64 Mo., 591. The point was ruled the same way in *People v. Harrington*, 42 Cal., 163, which seems to have been the first case in this country where this ancient rule of the common law was considered and enforced.

It is unnecessary to notice other errors assigned.

Judgment reversed.

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JONES v. THE STATE.

(18 Neb., 401.)

ASSAULT WITH INTENT TO KILL: *Information — Grand jury — Talesmen.*

1. **INFORMATIONS.**—The act "to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges," which took effect June 10, 1885, of the state of Nebraska, applies to all cases where grand juries were required after the act took effect.
2. **GRAND JURY — HOW REQUIRED.**—The proceeding by information is exclusive, unless the judge in a written order, filed with the clerk of the court, shall require a grand jury, in which case it shall be drawn in the manner provided by law.
3. **TALESMEN.**—The authority to require a jury to be summoned from the by-standers is repealed by implication.

Error to the District Court for Cuming County.

Wilbur F. Bryant, for plaintiff in error.

William Leese, attorney-general, *Guy R. Wilbur*, district attorney, and *T. M. Franse*, for defendant in error.

MAXWELL, J. Plaintiff in error was convicted in the district court of Cuming county of shooting at another person with intent to kill, and was sentenced to imprisonment in the penitentiary for eight years. He now prosecutes error to this court. It appears from the record that the March term, 1883, of the district court of Cuming county was adjourned till the 23d of June, the grand jury being discharged; that on the 23d day of June, 1885, an order was entered by said court requiring the sheriff to summon a grand jury from the by-standers. The sheriff thereupon summoned a grand jury from the by-standers, as ordered, and such jury found the indictment against the plaintiff in error upon which he was convicted. His attorney thereupon filed a motion to quash the indictment because the grand jury had not been legally drawn; which motion being overruled, a plea in abatement upon the same ground was interposed, which was held insufficient. There are other questions in the case, but in the view we take of the indictment it will be unnecessary to consider them. At the last session of the legislature an act was passed "to provide for prosecuting offenses on information, and to dispense with the calling of grand

juries except by order of the district judges." This act took effect on the 5th day of June, 1885. Comp. St. 1885, Crim. Code, ch. LIV. Section 7 provides that "grand juries shall not hereafter be drawn, summoned or required to attend at the sitting of any court within this state, as provided by law, unless the judge shall so direct by writing, under his hand, and filed with the clerk of said court." At the same session of the legislature, sections 660, 661 and 662 of the code were amended to read as follows:

"Sec. 660. The clerk of the district court or his deputy, and the sheriff or his deputy, or, if there be no sheriff or deputy-sheriff, the coroner of the county, shall, at least ten days before the first day of the session of the district court, meet together and draw by lot out of the box,—a receptacle wherein shall be kept the tickets mentioned and referred to in section (659) six hundred and fifty-nine of said title,—twenty-four names, and the persons whose names are drawn shall be petit jurors. And when a grand jury is ordered, the clerk or deputy-clerk, and sheriff or deputy-sheriff, or coroner if there be no sheriff or deputy-sheriff, shall then draw sixteen (16) additional names, and the persons whose names are drawn shall be the grand jury."

"Sec. 661. The clerk shall, on the day of the drawing aforementioned, issue an order to the sheriff, deputy-sheriff or coroner, as the case may be, commanding him to summon the persons whose names are drawn as petit jurors to appear before the district court at or before the hour of 11 o'clock on the morning of the first day of the term, stating in the order the day of the week and month, and the place of the sitting of the court, to serve as petit jurors; and a like order commanding the sheriff, deputy-sheriff, or coroner to summon the grand jury when a grand jury has been ordered and drawn."

"Sec. 662. The sheriff, deputy-sheriff, or coroner, having received the order, shall, at least five days before the first day of the session of the court, make service of said order upon each person whose name was selected and drawn as a petit juror, by reading or delivering a copy of the same to the person summoned, or by leaving a copy at his residence, except that the copy shall contain only the name of the person served, and not the name of any other petit juror; and when a grand jury is

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ordered and summoned, service of said order shall be made on each person in the same manner as is provided for service on a petit juror in this section."

This act contains an emergency clause, and took effect on the 5th day of March, 1885. The act requiring prosecutions for crime to be instituted by information was intended to supersede prosecution by indictment. It is a new remedy, requiring the accuser and the accused to meet face to face when prosecutions for crime are instituted. As, with the exception of fugitives from justice, no information can be filed until there has been had a preliminary examination before a justice of the peace, or other examining magistrate or officer, it will thus be known, in advance of a term of court, what persons are charged with crime, and the necessity, if any exists, for calling a grand jury. The legislature evidently supposed that, ordinarily, such jury would be unnecessary, and the power to call a grand jury was reserved to the judge, to be exercised by him only when, in his opinion, the demands of public justice required it. He must determine the necessity; but when, in his opinion, a jury is necessary, the statute has pointed out the procedure to be followed, viz., an order in "writing under his hand, and filed with the clerk of the court." This is to be filed with the clerk "at least ten days before the first day of the session of the district court," and a jury will then be drawn from the receptacle in which the names of sixty persons, selected for jurors by the county board, are kept. It will be observed that, under the former statute, the names of grand jurors were drawn before those of the petit jurors, while under our present law the names of the petit jurors are first drawn. This court, from its earliest organization, has required grand juries to be drawn in the manner provided by law. Thus, in *Burley v. The State*, 1 Neb., 397, it is said: "The grand jury must be selected in the manner prescribed by the law. There is no security to the citizen but in a rigid adherence to the legislative will as expressed in the statutes made for our guidance." This case was cited with approval in *Preuit v. The People*, 5 Neb., 377; *McEoy v. The State*, 9 Neb., 158; *Clark v. Saline Co.*, 9 id., 516; *Priest v. State*, 10 Neb., 393; and was followed in *Bohanan v. State*, 15 Neb., 209,

and some other cases without being cited, and is the settled law of this state.

The importance of securing fair-minded, impartial, intelligent men for jurors, who, without feeling or bias, will weigh the evidence, and be governed by it alone, cannot be overestimated. To secure such jurors, the statute requires the names of electors to be selected in due proportion from all parts of the county. Under the former statute, where, after a grand jury was discharged, it became necessary to summon another, the court could order it summoned from the by-standers. This power, perhaps, was necessary to prevent a failure in the administration of the law in some cases, but under the present statute this power is unnecessary, and the statute is repealed by implication. The court therefore had no power to order a grand jury summoned from the by-standers, and as proper objections were made to the jury by a plea in abatement, the jury should have been discharged. The indictment therefore is invalid, and must be quashed. The judgment of the district court is reversed, the indictment quashed, and the plaintiff in error remanded to the proper authorities of Cuming county, to be dealt with according to law.

Reversed and remanded.

(The other justices concurred.)

NOTE.—*Direct intent or reckless disregard of life*—*Premeditation*—*Intent—Malice—Actual battery*.—An assault with a deadly weapon—*e. g.*, by discharging a pistol either with express malice and direct intent to murder an individual, or with a reckless and total disregard of human life—is an assault with intent to murder. The intent and malice which are essential elements of such offense may be proved either by direct evidence, or they may be inferred from facts and circumstances in evidence. It is immaterial to the completion of such an offense whether there is any actual battery or not. *Conn v. The People*, 116 Ill., 458.

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BURNEY v. THE STATE.

(21 Tex. Ct. App., 505.)

ASSAULT WITH INTENT TO RAPE.

1. ASSAULT WITH INTENT TO RAPE—FRAUD AND THREATS.—To warrant a conviction under an indictment for an assault and battery with intent to commit rape, the state must prove the actual or attempted use of force. Fraud and threats have no part in such an offense under the Penal Code of Texas.
2. CHARGE IN EXACT WORDS OF STATUTE.—A charge, though in almost the exact words of the statute, is erroneous, where the facts of the case at bar are such as not to warrant its application.

Appeal from the District Court of McLennan.
The opinion states the facts.

W. S. Baker and *Clark & Dyer*, for the appellant.
J. A. Burts, assistant attorney-general, for the state.

WHITE, P. J. This is an appeal from a conviction in the court below for an assault with intent to commit rape.

In the ninth paragraph of the charge of the court to the jury they were instructed that, "when an injury is caused by violence to the person, the intent to injure is presumed, and it rests with the person inflicting the injury to show the accident or innocent intention. The injury intended which raises the presumption referred to in this paragraph may be either bodily pain, constraint, a sense of shame or other disagreeable emotion of the mind; but from such assault no specific intent to have carnal knowledge in a manner to constitute rape is presumed by law, but such intent must appear from the evidence." In *Thomas' Case*, 16 Tex. Ct. App., 535, which was an appeal from a conviction for an assault with intent to rape, where a somewhat similar charge was given, this court says: "Whilst the paragraph is in almost the exact words of the code (Penal Code, art. 485), and, in the abstract, is unquestionably correct, still we think it was error to give it in this case. The burden was upon the state to show beyond a reasonable doubt that the defendant committed the assault, and that he committed it with the specific intent of raping the person assaulted."

Again, the court charges the jury: "If you believe from

the evidence, beyond a reasonable doubt, that in the county of McLennan and state of Texas, on or about the 24th day of March, 1886, the defendant did then and there unlawfully and feloniously use, or attempt to use, unlawful violence upon the person of said Maggie Schuster, or did then and there make any threatening gesture showing in itself, or by words accompanying it, an immediate intention, coupled with an ability, to use unlawful violence upon said Maggie Schuster, without her consent, by force or threats, as force and threats have been defined, and that said Maggie Schuster was then and there a female, you will find the defendant guilty of an assault with intent to commit rape, as charged in the indictment, and assess his punishment at confinement in the penitentiary not less than two nor more than seven years; and, unless you so believe, you will find the defendant not guilty of the offense."

This charge was erroneous, in that, in effect, it told the jury that the offense of assault with intent to commit rape could be established by proof of threats, whereas such offense cannot be established by proof of threats, but only on proof of force or attempted force. The offense of an *attempt* to commit rape may, it is true, be sustained on proof of threats, but an assault with intent to commit rape cannot. The offense of an attempt to commit rape may be predicated upon force, threats or fraud; but threats or fraud have no part in an assault with intent to commit rape, which must be the result of force or attempted force alone. In other words, where it is attempted, by threats or fraud, such as are spoken of in the statutory definition of the offense, and such terms are defined in connection with the offense by articles 528, 530 and 531, Penal Code, an indictment will lie alone for an attempt to commit rape; but, if force is an element in the attempted commission of rape, then, indeed, resort may be had to the statute, of assault with intent to commit the offense. Art. 523, Penal Code. "An assault with intent to commit any other offense is constituted by the existence of the facts which brings the offense within the definition of an assault coupled with an intention to commit such offense." Penal Code, art. 506. A person cannot be convicted of an attempt to rape under an indictment for an assault with intent to rape. *Brown v. State*, 7 Tex. Ct. App., 569. It may be that, under the charge of the

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court as above quoted, the jury have been misled into finding appellant guilty upon a state of facts which would alone be applicable to establish the offense of an attempt to rape.

For these errors in the charge of the court to the jury the judgment is reversed, and the cause remanded.

PADGETT v. THE STATE.

(103 Ind., 550.)

ASSAULT WITH INTENT TO ROB: *Motion in arrest—Indictment—Record.*

1. ASSAULT—PROOF OF FELONIOUS INTENT.—Direct and positive evidence of a felonious intent is not necessary in a prosecution for assault and battery, for if there is even a scintilla of evidence to that effect, the supreme court will not reverse on the ground that such evidence is indirect and unsatisfactory.
2. MOTION IN ARREST.—That the record fails to show that the indictment was returned by the grand jury into open court is not a statutory cause for a motion in arrest of judgment.
3. INDICTMENT AND INDORSEMENTS PART OF THE RECORD.—The original indictment and its indorsements constitute a necessary part of the record, and whatever is properly shown by them is considered as shown by the record.

From the Daviess Circuit Court.

C. K. Thorp, for appellant.

F. T. Hord, attorney-general, *W. B. Hord* and *J. H. Spencer*, for the state.

Howk, J. The indictment in this case charged that the appellant, "Marshall Padgett, on the 25th day of July, 1885, at the county of Daviess and state of Indiana, did then and there, in a rude, insolent and angry manner, unlawfully touch, strike and beat one William James, with intent, then and there, and thereby, feloniously to steal, take and carry away the money of the said William James, of the value of \$3, in the lawful currency of the United States." Upon the appellant's arraignment and plea of not guilty the issues joined were, by agreement of the parties, submitted to the court for trial without the intervention of a jury. After hearing the

evidence the court found appellant guilty as charged in the indictment, and assessed his punishment at two years in the state's prison and a fine of \$10, and, over his motions for a new trial and in arrest, judgment was rendered accordingly.

In this court appellant has assigned as errors the overruling (1) of his motion for a new trial and (2) of his motion in arrest of judgment. The first question discussed by appellant's counsel, under the alleged error of the court in overruling the motion for a new trial, is the sufficiency, or, rather, as counsel claims, the insufficiency, of the evidence to sustain appellant's conviction. It is true, as counsel contends, that, in such a prosecution as this, "the intent was the gist of the felony charged, and it devolved upon the state to make it out." *Greer v. State*, 53 Ind., 420; *White v. State*, 53 Ind., 595. But it is equally true that the state is not expected, and cannot be required, to make proof of felonious intent, as a fact, by direct and positive evidence; for, as a general rule, men who do or commit acts which the law denounces as public offenses do not proclaim in public places the intent with which such acts are done. If the state were required to make direct and positive proof of the felonious intent which characterizes the act done as a public offense, the result would be that many persons, charged and guilty of public crimes, would go acquit, "unwhipped of justice." Therefore, all that the state is required to do, in such cases, is to introduce such evidence on the trial of the cause as will satisfy the triers of the facts, whether court or jury, beyond a reasonable doubt, not only that the act was done by the defendant, but that it was done with the felonious intent charged in the indictment.

The case at bar is not a satisfactory one upon the evidence appearing in the record; and yet it is not a case where we are authorized to interfere with the finding and judgment of the trial court. The learned judge who tried the cause had opportunities and facilities which we cannot have for determining the credibility of witnesses and the proper weight to be given to their evidence. Upon the question of the felonious intent, the evidence seems to us, from our reading of it, to be weak and unsatisfactory; but we cannot say that there is a failure of evidence on that or any other material point in the case. In accordance with repeated decisions of this court in

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similar cases, we must decline, therefore, to disturb the finding of the trial court on the evidence. *Cox v. State*, 49 Ind., 568; *Long v. State*, 95 Ind., 481; *Murphy v. State*, 97 Ind., 579; *Dolke v. State*, 99 Ind., 229; *Clayton v. State*, 100 Ind., 201. Under the alleged error of the court in overruling the motion in arrest of judgment, appellant's counsel contends that the judgment ought to have been arrested, because the record fails to show that the indictment in this case was returned by the grand jury into open court. This is not the cause assigned by appellant in his written motion in arrest, nor is it one of the statutory causes for which judgment may be arrested in a criminal cause. Section 1843, R. S. 1881, provides that a motion in arrest may be granted by the court for either of the following causes:

"First, that the grand jury which found the indictment had no legal authority to inquire into the offense charged, by reason of its not being within the jurisdiction of the court.

"Second, that the facts stated in the indictment or information do not constitute a public offense."

The second of these statutory causes is the only one assigned by appellant in his written motion for the arrest of judgment in this case. It needs no argument, we think, for the purpose of showing that this cause for the arrest of judgment did not present to the trial court, nor does it present here, the question discussed by counsel as to whether or not the record fails to show that the indictment against appellant was returned by the grand jury into open court. But, if the question were properly presented here, we would hold that the record of this cause does affirmatively show, with sufficient certainty, that the indictment against the appellant was duly returned by the grand jury into open court. The record shows that, on the 25th day of September, 1885, the following entry was made in the order book of the court below, to wit:

"Come now the grand jury and return in open court seven indictments, which are each signed 'Hiram McCormick, Prosecuting Attorney,' and indorsed 'A true bill: Stephen T. Gough, Foreman,' and numbered respectively on the backs thereof, 1740-1743," etc. "And said indictments are examined by the court and filed by the clerk."

Then, indictment No. 1743 is set out, with all its indorse-

ments, in the record before us, as the indictment against the appellant, Marshall Padgett, in this case. In *Beard v. State*, 57 Ind., 8, it was held by this court, and correctly so, we think, that the original indictment and all its indorsements constitute a necessary part of the record in a criminal cause, and that whatever may be shown which is required to be shown by these indorsements must be considered by this court as shown by the record. See, also, *Clare v. State*, 68 Ind., 17, and *Greene v. State*, 79 Ind., 537.

We have found no error in the record of this cause which will authorize the reversal of the judgment. The judgment is affirmed, with costs.

PEOPLE V. MURRAY ET AL.

(67 Cal., 103.)

ATTEMPT TO COMMIT BURGLARY: *Information — Offense — Charge — Demurrer.*

INFORMATION FOR ATTEMPT TO COMMIT BURGLARY — OFFENSE, HOW CHARGED.

An information for an attempt to commit burglary, a statutory offense, which charges the offense in the language of the statute, is sufficient.

Appeal from the Superior Court of the County of San Joaquin.

Attorney-General Marshall, for appellant.

J. H. & J. E. Budd, for respondents.

By THE COURT. The defendants were accused, by information, of the crime of attempt to commit burglary, a felony, committed as follows:

"The said John Murray and James Cunningham . . . did wilfully, unlawfully and feloniously attempt to wilfully, unlawfully and feloniously enter that certain room of," etc., "with the intent then and there, and therein, wilfully, unlawfully and feloniously to commit larceny."

The information was demurred to on the ground that it did not comply with sections 950 and 952 of the Penal Code, the

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first of which sections declares that the information must contain a "statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended;" *second*, that the facts stated do not constitute an offense; and *third*, that the information does not state facts sufficient to constitute an offense. The demurrer was sustained.

According to Wharton (1 Crim. Law, §§ 190-192), the above statement of facts would not be sufficient according to the common law rules; it was necessary to have stated the acts constituting the attempt. "But," says Wharton (section 191, above), "where the legislature has by statute declared a particular act to be indictable, and provided that it shall be enough to describe such act in the statutory terms,—when this is done by direction or implication,—it is proper for the courts to hold, as has been done, that an indictment charging that the defendant did attempt to feloniously steal from the house of A. B., or commit a rape on A. B., is good."

The statute of this state (Penal Code, § 459) defines the crime of burglary, and section 664 declares that "every person who attempts to commit any crime," etc., is punishable, but does not declare what acts shall constitute an attempt. It has been frequently held by this court sufficient to state the offense charged in the language of the statute. Applying these rules to the information before us, it is sufficient.

The order is reversed, and the cause is remanded to the superior court of San Joaquin county, with directions to overrule the demurrer.

EX PARTE BROWN.

(68 Cal., 176.)

BAIL: Party convicted of felony not entitled to, as matter of right.

BAIL AFTER VERDICT, WHEN ALLOWABLE — "CONVICTION," IN STATUTE, CONSTRUED.—A defendant convicted of felony in a case not punishable with death is not, under the California statute (sec. 1271, Penal Code), entitled, as a matter of right, to be admitted to bail after conviction, bail being allowable in such cases only as a matter of discretion. The word "conviction," as used, signifies a finding by the jury of a verdict that the accused is guilty.

Application for writ of *habeas corpus* to admit the petitioners to bail.

George W. Tyler, for petitioners.

J. N. E. Wilson, *contra*.

THORNTON, J. Application for admission to bail by Brown and Weile, after the verdict of the jury finding each of them guilty of a felony, and before judgment pronounced on the verdict. The verdict was accepted and recorded by the court. It is contended that under the law of this state the applicants are entitled to be admitted to bail as a matter of right. It was held in *People v. Tindler*, 19 Cal., 539, under the constitution of 1849, that in all other than capital cases, and in all capital cases where the guilt is not evident or the presumption great, that a defendant is entitled to bail as a matter of right. The constitution of 1879 has made no change in the law as just above stated; and, under the former constitution (and the same is the rule under the present constitution), the guaranty of bail as a matter of right extends only to those cases where the party has not already been convicted. *Ex parte Voll*, 41 Cal., 29.

The statute (see Penal Code, §§ 1270-1272) is in accord with the foregoing. We insert here the text of these sections:

"Sec. 1270. A defendant charged with an offense punishable with death cannot be admitted to bail, when the proof of his guilt is evident or the presumption thereof great. The finding of an indictment does not add to the strength of the proof, or the presumptions to be drawn therefrom.

"Sec. 1271. If the charge is for any other offense, he may be admitted to bail before conviction, as a matter of right.

"Sec. 1272. After conviction of an offense not punishable with death, a defendant who has appealed may be admitted to bail (1) as a matter of right, when the appeal is from a judgment imposing a fine only; (2) as a matter of discretion in all other cases."

It is said that there has been no conviction in this case, as judgment has not been pronounced on the verdict.

The question, then, presented for decision is this: What is a *conviction*? The ordinary meaning of this word is the finding by a jury of a verdict that the accused is guilty. In legal par-

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lance it often signifies the final judgment of the court. The above is said to be the signification of the word "conviction" in *Blaufus v. People*, 69 N. Y., 109. Blackstone says: "If the jury find him (the prisoner) guilty, he is then said to be *convicted* of the crime whereof he stands indicted; which conviction may occur two ways: either by his confessing the offense and pleading guilty, or by his being found so by the verdict of his country." 4 Bl. Comm., 262. The same author says: "The plea of *autrefois acquit*, or a former conviction for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment." 4 Bl. Comm., 336. In 1 Inst., 391, it is said: "The difference between a man attainted and convicted is that a man is said convict before he hath judgment; as if a man be convict by confession, verdict or recreance, and when he hath his judgment upon the verdict he is said to be attaint." And further, it is said by the same writer: "So as by conviction of a felon, his goods and chattels are forfeited; but by attainder, that is by judgment given, his lands and tenements are forfeited and his blood corrupted, and not before." In Jacob's Law Dist., 163, it is said: "There is a great difference between a man *convicted* and *attainted*, though they are frequently, though inaccurately, confounded together;" and in the same work, it is said: "Convict, *convictus*; he that is found guilty of an offense by verdict of a jury. Crompton saith that conviction is either when a man is outlawed, or appeareth and confesseth, or is found guilty by the inquest; and when a statute excludes from clergy persons found guilty of felony, etc., it extends to those who are convicted by confession. Crompt. Just., 9." "Judgment amounts to conviction, though it doth not follow that every one who is convicted is adjudged." 2 Crompt. Just., 63, tit. "Convict and Conviction." Bishop says: "The word 'conviction' ordinarily signifies the finding of the jury, by verdict, that the prisoner is guilty. When it is said there has been a conviction, or one is convict, the meaning usually is, not that sentence has been pronounced, but only that the verdict has been returned. So a plea of guilty by the defendant constitutes a conviction of him." He then quotes the passage first above given from 1 Inst., and continues: "Yet the word con-

viction, when it stands in such a connection with other words as to indicate a secondary or unusual meaning, sometimes denotes the final judgment of the court. Where the proceeding is civil in form, for the recovery of a fine, there cannot be what in law is called a conviction. It has likewise some other significations, according to one of which 'a conviction is defined to be a record of the summary proceedings upon any penal statute, before one or more justices of the peace, or other persons duly authorized, in a case where the offender has been convicted and sentenced.' " Bish. St. Crimes, § 348. The same writer says: "A conviction in ordinary legal language consists of a plea or verdict of guilty, and it is immaterial whether or not final judgment has been rendered thereon." 2 Bish. Crim. Law, § 903; 1 Bish. Crim. Law, § 963. See, also, on this point, *People v. March*, 6 Cal., 543; *People v. Goldstein*, 32 Cal., 433; *Blair's Case*, 25 Grat., 853; *Com. v. Williamson*, 2 Va. Cas., 211; *Shepherd v. People*, 24 How. Pr., 38; *Com. v. Lockwood*, 109 Mass., 324; *State v. Alexander*, 76 N. C., 231; *Com. v. Richards*, 17 Pick., 296; *Nason v. Staples*, 48 Me., 125; *U. S. v. Gibert*, 2 Sum., 40; 2 Hawk. P. C., ch. 36, §§ 1, 10; *U. S. v. Watkins*, 6 Fed. Rep., 153; Bouv. Law Dict., *verb.* "Conviction."

The foregoing references show that the ordinary meaning of the word "conviction" is the verdict of guilty pronounced by a jury. As said by Reade, J., speaking for the court in *State v. Alexander*, *supra*, "The word is ordinarily used to denote the verdict of the jury, guilty. How did the jury find? Guilty; or they convicted him. What did the judge do? Sentenced him to be hanged. This is the language ordinarily used in such matters, both in conversation and in books, law and literary. It is never said that the jury sentenced him, nor that the judge convicted him." 76 N. C., 232. Now, while the word may be used as signifying the sentence pronounced on the verdict, or the record of conviction, including *inter alia* the verdict and sentence, still such meaning ought not to be attributed to it, unless there is something in the context to indicate that it was used in such sense, as in *Com. v. Gorham*, 99 Mass., 420; *Burgess v. Boetefeur*, 7 Man. & G., 481, 508. These words "conviction" and "convicted" are used in the constitution, and frequently in the statutes of this state. See Const., art. 1, § 20,

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By the first article (section 20) of the constitution it is provided: "No person shall be convicted of treason, unless on the evidence of two witnesses to the same overt act or on confession in open court." We think that as it would be proper to instruct the jury on a trial for treason that they could not convict, unless upon the testimony of two witnesses to the same overt act, the word "convicted" has reference to the verdict of the jury, and not to the sentence pronounced on the defendant. It also refers to the confession in open court, or plea of guilty, prior to the delivery of judgment. There is nothing in the context to show that the word "convicted" is used in any other than its ordinary sense. These words are used with a like meaning in the greater number of the sections above cited from the Penal Code. This we think is true of section 689 of the Penal Code, which is as follows:

"No person can be convicted of a public offense, unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer in the case mentioned in section 1011, or upon a judgment of a court, a jury having been waived, in a criminal case not amounting to felony."

Of a statute similar in Virginia it was said in *Blair's Case* that it plainly implies that a person may be convicted in either of these modes. In section 1161, above cited, we find the expression "verdict of conviction" is used, which clearly implies that a verdict is a conviction. In section 1151, *supra*, it is said "a general verdict upon a plea of not guilty is either guilty or not guilty, which imports a conviction or acquittal of the offense charged in the indictment." It must be the verdict of guilty which *imports* the conviction, and if it imports a conviction it means or signifies it. In sections 1217 and 1218, *supra*, the words "conviction" and "judgment" are both used. There can be little doubt here that the former means a verdict of guilty. It is unnecessary to examine particularly all the sections above cited. We are satisfied that *conviction*, in the section (1271) above cited, signifies the verdict of guilty pronounced on a trial by the jury. In view of section 1166 of

same code, we cannot see that any other conclusion than the above can be reached. The section is as follows:

"If a general verdict is rendered against the defendant, or a special verdict is given, he must be remanded, if in custody; or, if on bail, he may be committed to the proper officer of the county to await the judgment of the court upon a verdict. When committed his bail is exonerated, or if money is deposited instead of bail, it must be refunded to the defendant."

It may be conceded that on a conviction by verdict of a felony, not capital, it is in the discretion of the court to order the defendant, when on bail, into the custody of the proper officer. But when the court does so order him into the custody, he orders him there to be kept by the officer until judgment is pronounced, and if there can be any admission to bail it must be discretionary with the court, and not a matter of right to the defendant. There is nothing in section 1272 in conflict with this. According to that section there is one case which is not bailable after conviction — that is, after conviction of an offense punishable with death — one case where, after conviction and appeal taken, bail is allowed as a matter of right, which is the case of an appeal from a judgment imposing a fine only. In all other cases than those above mentioned, where the defendant has been convicted and has appealed from the judgment, bail is allowed at the discretion of the tribunal granting it.

It may be questioned, when reading sections 1166, 1271 and 1272 together, and comparing each section with the other, whether bail is allowed in the class of cases last mentioned in section 1272, intermediate the verdict and an appeal. If it is allowable at all, it must be as a matter of discretion. We think it settled law in this state by the judgments of the court in *Ex parte Voll*, 41 Cal., 29; *Ex parte Marks*, 49 Cal., 680; *Ex parte Smallman*, 54 Cal., 35, and *People v. Marshall*, 59 Cal., 386, that this court ought not to admit to bail after a verdict of guilty, unless when circumstances of extraordinary character had intervened since the conviction. No such circumstances are made to appear here.

We add here, in explanation of the foregoing, that there can be conviction in other modes than by the verdict of a jury. Conviction can be by plea of guilty and in the other modes

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mentioned in section 689 above cited. But in all these modes conviction takes place before judgment, except in the last mode mentioned in section 689, and in that it will be observed that a jury is waived, and the trial is by the court, in a case which does not amount to felony. The words "conviction" and "convicted" may signify either of these modes.

From the foregoing it follows that the defendants should not be admitted to bail, and their application is therefore denied, and they are remanded to the custody of the officer.

So ordered.

We concur: McKee, J.; Ross, J.; Morrison, C. J.

ROBERTS ET AL. V. THE STATE.¹

(34 Kan., 151.)

BAIL: *Bond taken in excess of order of court, void.*

BAIL TAKEN BY SHERIFF IN EXCESS OF AMOUNT DIRECTED BY COURT, VOID.

Where the district court directs bail to be taken in the penalty of \$1,200, and the sheriff requires and accepts from the principal and his sureties a bond in the sum of \$1,250, the bond is utterly void, as the sheriff is only authorized to require bail in such an amount as is directed by the court. The provisions of section 154 of the Criminal Code do not apply to such a case.

Error from Marion District Court.

Sedgwick & Kellogg, for plaintiffs in error.

Frank Doster and T. A. Bogle, for defendant in error.

HORRON, C. J. Action brought March 10, 1882, upon an alleged forfeited recognizance executed to discharge C. F. Roberts from custody, charged with having committed robbery in Marion county. A copy of the recognizance was attached to the petition, and it was averred therein that the amount of the recognizance was \$1,250. On February 23, 1884, when the action was being tried, it was disclosed that the order of the court fixed the recognizance at \$1,200. Thereupon the petition was amended, and the recognizance set out and averred to be

¹ See note.

\$1,200 only. The action was then continued. Upon the final trial of the case, the defendants below introduced evidence tending to show that the recognizance required of C. F. Roberts by the sheriff, and executed by the defendants, was for the sum of \$1,250, and that this was the only recognizance ever signed in the case. The defendants also requested the court to instruct the jury in substance as follows:

"That, as the recognizance in the criminal action against C. F. Roberts was fixed by the district court of Marion county at \$1,200, the sheriff had no authority to require of said Roberts a recognizance for any larger sum than ordered by the court; that if they believed from the evidence the recognizance sued on was required of the defendants below, and executed by them for the sum of \$1,250, the recognizance would be void, and they must find for the defendants."

This instruction was refused, and the court charged the jury "that it was immaterial whether the recognizance given by the defendants was for the sum of \$1,250 or \$1,200." The charge of the court was erroneous and prejudicial to the rights of the parties excepting. In *United States v. Goldstein's Sureties*, 1 Dill., 413, it appeared that a United States commissioner, on proper complaint and proceedings before him, required a person charged with receiving stolen property of the United States, knowing it to be stolen, to give bail in the sum of \$500 to appear at the next term; and the commissioner at the same time, on another charge of like nature, required the same person to give bail in the sum of \$200 to appear at the next term, etc., and one bond for \$700 was taken. The proper cognizor having failed to appear, the bond was declared forfeited. Miller and Dillon, JJ., decided that the bond taken was a substantial departure from the bonds required by the commissioner, and was not, therefore, obligatory on the sureties. See, also, *Waugh v. People*, 17 Ill., 563; *Barringer v. State*, 27 Tex., 553; *Neblett v. State*, 6 Tex. Ct. App., 316; *State v. Buffum*, 22 N. H., 267.

Counsel for the state concede the above authorities correctly state the general rule applicable to recognizances, but attempt to evade the force of these decisions by referring to section 154 of the Criminal Code. They say that the provisions of this section have made radical and sweeping changes in the com-

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mon law doctrine of recognizances, both as to their form and the liability of parties thereto. This section is as follows:

"No action upon a recognizance shall be defeated, nor shall judgment thereon be arrested, on account of any defect of form, omission of recital, condition of undertaking therein, neglect of the clerk or magistrate to note or record the default of any principal or surety at the term or time when such default shall happen, or of any other irregularity, so that it be made to appear that the defendant was legally in custody, charged with a public offense, that he was discharged therefrom by reason of the giving of the recognizance, and that it can be ascertained from the recognizance that the sureties undertook that the defendant should appear before a court or magistrate for examination or trial for such offense."

We think, however, that the statute does not apply to such a case as the present. The recognizance is not defective on account of form, omission of recital, condition of undertaking, or for the neglect of any clerk or magistrate, or for any other irregularity. It is more than defective or irregular; *it is utterly void*. The recognizance is a substantial departure from the bond required by the district court. "Bonds to secure the appearance of a person charged with crime must be taken and executed in pursuance of the order of the proper court or officer." *U. S. v. Goldstein's Sureties, supra*.

In Indiana the statute provides that:

"No recognizance, undertaking or bond taken in any criminal proceeding shall be void for want of form or of substance, or for omission of any recital or condition, or because the same was entered into on Sunday; nor shall the principal or surety be discharged, but the principal and surety shall be bound by such recognizance, undertaking or bond to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in such recognizance, undertaking or bond. And no action upon such recognizance, undertaking or bond shall be defeated for any want of form or substance, or for the omission of any recital or condition, or because the same was entered into on Sunday, or for the neglect of the clerk to indorse or record it; but the recognizers shall be bound thereby to the full extent specified therein. A recognizance may be recorded after execution has been awarded."

The supreme court of that state, in *State v. Winninger*, 81 Ind., 51, in referring to this statute, says that "a recognizance taken by a court without jurisdiction, or by an officer without authority, is void." The sheriff was bound to pursue his authority strictly, and when he departed from it and required bail in excess of the order of the district court, he acted without authority, and the recognizance was as void as if he had no authority whatever to require bail. *Waugh v. People*, *supra*. None of the decisions of this court, construing section 154 of the Criminal Code, are in conflict with this conclusion. The other questions presented in the briefs need not be noticed.

The judgment of the district court will be reversed and the cause remanded for a new trial.

(All the justices concurring.)

NOTE.—In *The State v. Soudriette*, 105 Ind., 306, which was a suit by the state of Indiana upon a forfeited recognizance, executed, as alleged, by the appellees, Charles H. and Elare Soudriette, it was alleged by the state in its complaint herein that on the 22d day of August, 1885, the appellee Charles H. Soudriette, having theretofore been charged at Knox county, Indiana, with having obtained goods under false pretenses, upon affidavit filed before John Wilhelm, mayor of the city of Vincennes, in such county, and having been duly arrested by the marshal of such city on a warrant issued by the mayor on such charge, he, with the other appellee, executed to the state of Indiana the recognizance for his appearance before such mayor, in the words and figures following, to wit: (Here is set out the recognizance, which runs to the city of Vincennes instead of to the state of Indiana.)

And the state further said that there was a clerical error in the making of said bond, in this: that from such bond, as drawn, it appeared that the appellees were bound unto the city of Vincennes to answer the charge of having violated a city ordinance; that such bond should have read: "Bound unto the state of Indiana to answer the charge of having obtained goods under false pretenses," as that was really the charge the appellee Charles H. Soudriette was arrested upon, and the charge for which such bond was given for his appearance before said mayor, at said time, "whereby a right of action has accrued unto the state of Indiana on said bond; and it prays judgment in the sum of \$100."

Howk, J., delivering the opinion of the court, says: "From the foregoing summary of the facts stated in the state's complaint, in the cause now before us, it is manifest that the question for our decision, as the cause is now here presented, may be thus stated: May the state, upon the facts stated and admitted to be true, recover upon the forfeited recognizance set out in the complaint, notwithstanding the singular and extensive "clerical errors" therein? Under the jeoffail provisions of our Civil Code, we are of opinion that this question must be answered in the affirmative."

In *People ex rel. Van Aken v. Millham and others*, 100 N. Y., 273, it is held

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that where one arrested on a charge of bastardy has given the bond for appearance required by 1 Revised Statutes, chapter 20, title 6, section 12, and after examination is begun the hearing is adjourned, his sureties are liable if he does not appear on the adjourned day.

It seems that a different rule might apply when, before the commencement of the examination, a postponement to a later day is made. *Id.*

In *Holmes v. The State*, 17 Neb., 73, it is held that a criminal recognizance requiring a person who has been charged with the commission of felony, and held to bail by an examining magistrate, to appear before the district court, on a day certain, to answer the charge preferred against him, is a sufficient compliance with section 307 of the Nebraska Criminal Code, if the date fixed in the recognizance for the appearance of the accused is in fact the first day of the next term of said court.

A recognizance taken by an examining magistrate, and signed by all the obligors, is sufficient, and will bind all, whether their names are entered in the body of the bond or not, provided it complies with the law in other respects.

A demurrer admits all allegations of the pleading to which it is made, and if an exhibit attached to a pleading is not "made a part" thereof, the pleading will yet be held good on demurrer, if the facts stated therein, including the giving of the instrument, are sufficient to constitute a cause of action.

Where a county judge, acting as an examining magistrate, requires the accused to enter into a recognizance for his appearance at the next term of the district court, and such recognizance is given, with sureties which are approved by such county judge, the indorsement of such approval upon the recognizance is not required to be attested by the seal of the county judge.

HANAWALT v. THE STATE.¹

(64 Wis. 84.)

BASTARDY: Evidence—Practice.

1. BASTARDY—LIKENESS OF CHILD TO DEFENDANT.—In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing, by its likeness to the defendant, its paternity.
2. IMPROPER COMMENTS BY COUNSEL.—The trial court, although allowing the bastard child to be exhibited in evidence, ruled that no comments should be made, but counsel for the state, in his argument, commented upon certain resemblances between the child and the defendant to which attention had not been called when the child was present. *Held*, that such comments were improper, and, in the absence of any direction to the jury to disregard them, might be ground for the reversal of a judgment against the defendant.

¹ See note.

Error to the Circuit Court for Waupaca County.

G. W. Cate, for the plaintiff in error.

L. F. Frisby, attorney-general, for the defendant in error.

TAYLOR, J. This was an action to charge the plaintiff in error with the support and maintenance of a bastard child. On the trial in the circuit court the state was permitted, against the objection of the plaintiff in error, to bring into court, and exhibit to the jurors for their inspection, as evidence in the case, the child of which he was charged with being the father; such child then being less than one year old. This is assigned as error in this court. The plaintiff also assigns as error that the counsel for the state was permitted to comment to the jury and draw their attention to the alleged similarity of the ears of the child to the ears of the plaintiff in error, as well as to the ears of the plaintiff's father, who was also in court, and in the presence of the jury, the child, at the time, being absent. Upon the question of the propriety of exhibiting the child to the jury as evidence in cases involving its paternity, the decisions of the courts are not in harmony. In North Carolina the supreme court of that state hold that such exhibitions may properly be made. See *State v. Woodruff*, 67 N. C., 89; *State v. Britt*, 78 N. C., 439; *Warlick v. White*, 76 N. C., 175; and *State v. Bowles*, 7 Jones, Law (N. C.), 579. The same was held by the supreme court of Iowa in *State v. Smith*, 54 Iowa, 104. In this last case the child was over two years old; but, in the case of *State v. Dunforth*, 48 Iowa, 43, the same court held it was improper to exhibit to the jury a child only three months old. In *Eddy v. Gray*, 4 Allen, 435; *Jones v. Jones*, 45 Md., 144; *Keniston v. Rowe*, 16 Me., 38, the courts hold that testimony of witnesses that the child looks like or resembles in appearance the person charged to be the father is not admissible; and in *Reitz v. State*, 33 Ind., 187, and *Risk v. State*, 19 Ind., 152, it was held error to permit the prosecution to give the child in evidence, so that the jury might compare it with the defendant, who was present in court.

In the *Douglas Case*, Lord Mansfield is reported as saying: "I have always considered likeness as an argument of a child's being the son of a parent; and the rather as the distinction between individuals in the human species is more discernible

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than in other animals. A man may survey ten thousand people before he sees two faces perfectly alike, and in an army of a hundred thousand men every one may be known from another. If there should be a likeness of feature, there may be a discriminancy of voice, a difference in the gestures, the smile, and various other things, whereas a family likeness runs generally through all these, for in everything there is a resemblance; as of features, size, attitude and action." This language attributed to Lord Mansfield is taken from Wills on Circumstantial Evidence, 94 (3d ed., 113; 5th Am. ed., 117). This author, on the next page, says that in a Scotch case, when the question was who was the father of a certain woman, an allegation that she had a strong resemblance in the features of the face to one of the tenants of the alleged father was held not to be relevant, as being too much a matter of fancy and of opinion to form a material article of evidence. In the case of *Jones v. Jones*, 45 Md., 164, the learned judge who wrote the opinion refers to the language used by Lord Mansfield in the *Douglas Case*, and disapproves of it as authority, and thinks it has not been followed as a precedent in the English courts; and he quotes with approval the language of Justice Heath in the case of *Day v. Day*, decided in 1797, in which the learned judge stated to the jury "that resemblance is frequently exceedingly fanciful, and he therefore cautioned the jury as to the manner of considering such evidence." The learned judge in the case of *Jones v. Jones*, *supra*, in disapproving of the language used by Lord Mansfield, says: "We all know that nothing is more notional in the great majority of cases. What is taken as a resemblance by one is not perceived by another with equal knowledge of the parties between whom the resemblance is supposed to exist."

It should be remembered that in the *Douglas Case*, and the Maryland case, the question of parentage was as to a person who was full grown. So that if there is anything certain in family likeness it would be fully developed, and if in any case such claimed likeness could be considered by a jury in determining the question of parentage, it would be in a case of that kind. In the case of *Jones v. Jones*, the court seemed to be of the opinion that, "when the parties are before the jury, and they can make the comparison for themselves, whatever re-

semblance is discovered may be a circumstance, in connection with others, to be considered." In any case this kind of evidence is inherently unsatisfactory, as it is a matter of general knowledge that different persons, with equal opportunities of observation, will arrive at different conclusions, even in the case of mature persons, when a family likeness will be fully developed if there be any. And when applied to the immature child its worthlessness as evidence to establish the fact of parentage is greatly enhanced, and is of too vague, uncertain and fanciful a nature to be submitted to the consideration of a jury.

The learned author of "Beck's Medical Jurisprudence" says: "It has been suggested that the resemblance of a child to the supposed father might aid in deciding doubtful cases. This, however, is a very uncertain source of reliance. We daily observe the most striking differences in physical traits between parent and child, while individuals born in different parts of the globe have been mistaken for each other. And even as to malformations, although some remarkable resemblances in this respect have been noticed between father and child, yet we should act unwisely in relying too much on them. There is, however, a circumstance connected with this, which, when present, should certainly defeat the presumption that the husband or paramour is the father of the child, and that is when the appearance of the child evidently proves that its father must have been of a different race from the husband or paramour, as when a mulatto is born of a white woman whose husband is also white, or of a black woman whose husband is a negro." In a case where the question of race is concerned, the child may be exhibited for the purpose of showing that it is or is not of the race of its alleged father. *Warlick v. White*, 76 N. C., 175. In a case like the one at bar, we think no exhibition should be made.

Justice Lyon, in the case of *Washburn v. M. & L. W. R. Co.*, 59 Wis., 364-370, says: "To allow jurors to make up their verdict on their individual knowledge of disputed facts material to the case, not testified to by them in court, or upon their private opinions, would be most dangerous and unjust. It would deprive the losing party of the right of cross-examination and the benefits of all the tests of credibility which the law affords. Besides, the evidence of such knowledge or the

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grounds of such opinions cannot be preserved in a bill of exceptions or questioned on appeal. It would make each juror the absolute judge of the accuracy and value of his own knowledge or opinions, and compel the appellate court to affirm judgments on the facts when all the evidence is before it, and there is none whatever to support the judgment." This reasoning clearly shows the impropriety of permitting the jury to base their judgment, in whole or in part, upon their inspection of the child exhibited to them in court. If the child itself, when presented to the jury for inspection, is or may be evidence tending to prove its parentage, then this court upon appeal could not reverse their verdict, although the written bill of exceptions entirely fail to support such verdict, for the reason that this court would not have before it all the evidence in the case upon which the jury acted.

The learned attorney-general says the bill of exceptions does not show that the child was exhibited to the jury as evidence in the case. In this he appears to be mistaken, as, in the part of the bill of exceptions which follows the reporter's notes of the evidence, it is clearly stated that "in course of the trial the plaintiff produced in court the child claimed to have been begotten by the defendant, and proposed to exhibit the same to the jury as evidence that it was the defendant's child. The defendant objected, and the court ruled that the child might be exhibited in evidence, but that no comments should be made." This statement, it will be seen, is made a part of the bill of exceptions.

The comments made by the counsel for the state to the jury in his argument, calling the attention of the jury to a peculiarity of the ears of the defendant and of his father, and his assertion that the child had the same peculiarity as to the ears, in the absence of the child, and without its appearing that the attention of the jury had been before called to such alleged peculiarity of the ears of the child, the defendant or his father, were highly improper and were likely to prejudice the rights of the defendant. This impropriety on the part of the prosecuting attorney might, in itself, be sufficient ground for a reversal of the judgment, in the absence of any direction on the part of the presiding judge to the jury to disregard entirely the statements so made by the counsel, and a clear state-

ment to the jury by such judge of the impropriety of such comments on the part of the counsel in his argument.

For the errors in permitting the child to be exhibited to the jury as evidence in the case, tending to prove its paternity, and on account of the impropriety of the counsel for the prosecution in calling the attention of the jury to the alleged peculiarity of the child's, the defendant's, and his father's ears, as above set forth, the judgment of the circuit court must be reversed.

By the Court.— The judgment of the circuit court is reversed, and the cause is remanded for a new trial.

NOTE.— *Right of defendant to have relatrix examined — Waiver.*— One against whom bastardy proceedings are instituted has a right to insist that the relatrix shall be present and her examination reduced to writing; but this is a right that may be waived, and where he goes to trial without making any effort to have the relatrix present, he will be deemed to have waived such right. *Unruh v. The State ex rel. Baum*, 105 Ind., 117.

IN RE WHEELER.¹

(34 Kan., 96.)

BASTARDY: Constitutional law — Imprisonment for debt — Object of prosecution — Imprisonment to enforce judgment for maintenance of child — Plaintiff.

1. **IMPRISONMENT FOR DEBT.**— The provision of the constitution declaring that "no person shall be imprisoned for debt except in cases of fraud" applies only to liabilities arising upon contract.
2. **BASTARDY — OBJECT OF PROSECUTION.**— The purpose of a proceeding in bastardy is to compel the father of the illegitimate child to assist in supporting the fruit of his immoral act, and to indemnify the public against the burden of supporting the child.
3. **IMPRISONMENT TO ENFORCE JUDGMENT FOR MAINTENANCE OF CHILD.**— The charge of maintenance and education which the father of an illegitimate child may be adjudged to pay under the bastardy act is not a debt in the sense in which that term is used in the provision of the constitution forbidding imprisonment for debt.
4. **STATUTE NOT UNCONSTITUTIONAL.**— That portion of the act which provides that the defendant, if he be in custody, shall be required to secure the payment of the judgment rendered against him by good and sufficient securities, and, in case of default, that he shall be committed to jail until the security is given, is not in conflict with section 16 of article 2 of the constitution.

¹ See note.

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W. D. Webb, for petitioner.

JOHNSTON, J. This is an application for a writ of *habeas corpus* by George H. Wheeler, in which he alleges that he is illegally deprived of his liberty by the sheriff of Brown county. The petitioner was charged by Ida E. Robbins, an unmarried woman, with being the father of a bastard child of which she was pregnant, and at a trial in the district court a jury found him to be the father of such child, and he was adjudged by the court to pay to the relatrix, Ida E. Robbins, for the support of the child, the sum of \$1,000 in twenty equal instalments of \$50 each. It was also adjudged that he should secure the payment of the \$1,000 by good and sufficient sureties to be approved by the clerk of the court, and in default thereof that he should be committed to the jail of Brown county. The return made by the sheriff shows that the petitioner has failed to comply with the judgment of the court, and that he is now held by virtue of a commitment issued upon such judgment. The petitioner alleges that his restraint is illegal, for the reason that the several provisions of the bastardy act which provide for imprisonment are in violation of section 16 of the bill of rights in the constitution, which is that "no person shall be imprisoned for debt except in cases of fraud." That part of the bastardy act which provides for the enforcement of the judgment of the court reads as follows:

"Sec. 13. Such court shall, on finding or confession, render such judgment and make such order as may seem just for securing the maintenance and education to such child, by the annual payment to the mother, or, if she be dead, or an improper person to receive the same, to such other person as the court may direct, and of such sum or sums of money as the court may order, payable at such time or times as may be adjudged proper. The judgment shall specify the terms of payment, and shall require of such defendant, if he be in custody, to secure the payment of such judgment by good and sufficient sureties; or, in default thereof, he shall be committed to jail until such security be given."

It is urged in behalf of the petitioner that this and other sections of the act that provide for commitment to the county jail come within the prohibition of the constitution above quoted.

We think not. There are many forms of liability that do not constitute a debt in the technical and legal sense of that term. Imprisonment for debt as here used has a well-defined meaning, and, as has been repeatedly decided, applies only to liabilities arising upon contracts. *McCool v. State*, 23 Ind., 129; *Ex rel. Brennan v. Cotton*, 14 Ill., 414; *Lower v. Wallick*, 25 Ind. 68; *Dixon v. State*, 2 Tex., 481; *Musser v. Stewart*, 21 Ohio St., 353; *Hawes v. Cooksey*, 13 Ohio, 242; *Moore v. Green*, 73 N. C., 394; *Ex parte Cottrell*, 13 Neb., 193. The charge of maintenance and education, while it is in the nature of a civil obligation and imposed in a proceeding which is essentially civil, though criminal in form, is not based upon contract, either express or implied. It is the duty of the father to make provision for the support of his illegitimate offspring. To compel him to assist in the maintenance of the fruit of his immoral act, and to indemnify the public against the burden of supporting the child, is the purpose of the proceeding in bastardy.

In *Musser v. Stewart*, *supra*, it is decided that "a proceeding in bastardy is not a suit to recover a sum of money owed from the defendant to the complaining party. The liability sought to be enforced is not founded upon contract, express or implied, but originates in the wrongful act of the defendant, against the consequences of which the statute is designed to protect the public." In *Ex parte Cottrell*, 13 Neb., 193, it is said that "the proceeding is properly a police regulation requiring the putative father to furnish maintenance for the support of his child, and to indemnify the public against liability for its support. The sum charged against the petitioner is not a debt in the sense in which that word is used in the constitution." In *Lower v. Wallick*, 25 Ind., 68, it was expressly ruled that the payment of money compelled by the statute for the support of an illegitimate child is not in the nature of a debt due upon contract, and that the provision in the constitution forbidding imprisonment for debt except in cases of fraud applies only to debts arising *ex contractu*.

The only cases brought to our notice holding a contrary doctrine are *Byers v. State*, 20 Ind., 47, and *Holmes v. State*, 2 G. Greene, 501. In *Lower v. Wallick*, 25 Ind., 68, the supreme court of Indiana expressly overruled the first of these cases, and

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the second has been referred to and disapproved in *Ex parte Cottrell*, 13 Neb., 193, and in *Lower v. Wallick*, *supra*. The statute does not assume that the relation of debtor and creditor exists between the father and mother of the illegitimate child. As has been seen, the charge of maintenance and education is not a debt due to the mother, nor is the money secured to be paid intended directly for her benefit, but it is rather for the benefit of the child, and to save the public from the burden of its support.

The further objection is made to the validity of the statute, that where the father is unable to comply with the order of the court, as the petitioner here claims to be, the period of imprisonment might continue an unreasonable length of time. This objection is answered by the limitation found in section 14 of the act in question, where the legislature has determined what is a reasonable time, and has provided that "no person adjudged to be the father of a bastard shall be imprisoned for any failure to comply with any order, direction or judgment of a court or justice for a term exceeding one year." If the testimony did not warrant the judgment that was rendered by the court against the petitioner, he should have prosecuted a proceeding in error instead of in *habeas corpus*.

It is next suggested, rather than urged, that the act is in conflict with section 16 of article 2 of the constitution; that the title of the act is not sufficiently comprehensive to embrace a punishment by imprisonment for failure to provide for the maintenance of the child in accordance with the judgment of the court. The title of the act is broad and comprehensive, and fairly includes the provisions objected to. It reads as follows: "An act providing for the maintenance and support of illegitimate children." The commitment of the prisoner to the jail of the county prescribed in the act is only a means of making and enforcing a provision for the maintenance of the child. The naked judgment, without stringent means of enforcement, would in many cases afford no relief whatever.

When the application for a writ of *habeas corpus* was first made, it appears that there was no formal *mittimus* in the hands of the sheriff, and, technically, the sheriff had no authority for his restraint; but since that time the clerk of the court has issued a proper warrant of commitment, upon which he is

now held. From the return made by the sheriff, it appears that the judgment and order of the court are valid, and have not been complied with by the petitioner; and even if the officer was without a warrant, or if the process in his hands was void, the petitioner could not be discharged, but should be held until valid process is obtained.

The question of who shall pay for the board, care and custody of the petitioner during his commitment, raised by the sheriff, cannot be decided in this proceeding. The petitioner will be remanded.

(All the justices concurring.)

NOTE.—*Who are and who are not regarded in law as bastards.*—In *Miller v. Anderson*, 43 Ohio St., 473, it is held that the natural father of a child cannot be held for its support, under the bastardy act of Ohio, if the mother, after the child was begotten and during pregnancy, contracts a marriage with another man, who marries her with full knowledge of her condition. By such marriage, the man so marrying consents to stand *in loco parentis* to such child and is presumed in law to be the father of the child, and this presumption is conclusive. *Roth v. Jacobs*, 21 Ohio St., 646.

In the latter case it was held that, after a woman pregnant with child had filed her sworn complaint in bastardy, charging the defendant with the paternity of her unborn child, her subsequent marriage with another did not necessarily work a discontinuance of the action, as the court say that it cannot be conclusively presumed that the man who marries a pregnant woman is the father of the child. He may not have known that she was in that condition when he married her, and therefore, if born alive, it may be a bastard. But when a man marries a woman with full knowledge of her pregnancy, he must solemnly and effectively acknowledge the unborn child to be his own, and he will be forever estopped from denying the paternity of the child.

In *Haworth v. Gill*, 30 Ohio St., 627, it was attempted to make a defendant liable under the bastardy act, by showing that, while complainant was the wife of another, he became the father of her unborn child. After the child was born the complainant procured from her former husband a divorce, and the court held that, to make the defendant liable, the delivery and pregnancy, as well as the making of the complaint, must be predicated as of an unmarried woman. The court in this case suggestively say: "But no complaint could have been made in this case, either during pregnancy or for eight months after delivery. The child was, during all this time, the innocent and honest child of a married woman, and in any proceeding under this act would have been conclusively presumed to be legitimate. The subsequent divorce of the mother may have changed her *status*, but not that of the child. It dissolved the marital relation, but did not bastardize the issue begotten and born during its continuance."

In *The State v. Shoemaker*, 62 Iowa, 343, it appeared that a child was begotten by the defendant, and during the pregnancy of the complainant and

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two months before the birth of the child, she was married to another man, who was fully informed that complainant was *enceinte*, and her condition was apparent from her appearance. Upon these facts the court held that the defendant could not be made liable under the bastardy act. The court say: If another man, not the father of the unborn child, elects to stand *in loco parentis* to the child, the law will esteem such man as the father. That one who marries a woman that he knows to be *enceinte* is regarded in law as adopting the child into the family at its birth. That he could not expect the mother to discard it, or abandon it at its birth, or refuse it nurture or maintenance, and that the child so receiving nurture and support must necessarily become one of the family of the wife, which would also be of the family of the husband. That this understanding must necessarily enter into the marriage contract of husband and wife; and when this relation is established, the law raises a conclusive presumption that the husband is the father of such child.

Can a child born in lawful wedlock be regarded as a bastard under the bastardy acts? Blackstone, under the inquiry, "Who are bastards?" says: "A bastard, by our English laws, is one that is not only begotten, but born out of lawful matrimony." 1 Bl., 454.

And Kent also defines illegitimate children or bastards as "being persons who are begotten and born out of lawful wedlock." 2 Kent, 208.

In Best on Presumptions, in discussing presumptions of legitimacy, the author says:

"One of the strongest illustrations of this principle (although resting in some degree on grounds of public policy) is the presumption in favor of the legitimacy of children. . . . Thus it is said to be a presumption, *juris et de jure*, that a child born during wedlock, and of which the mother was visibly pregnant at the time of marriage, must be taken to be the offspring of the husband." Best on Presumptions, 70.

The supreme court of Iowa, in the case of *State v. Romaine*, 58 Iowa, 48; S. C., 11 N. W. Rep., 721, lays down the rule that "if a woman be pregnant at the time of the marriage, and if the pregnancy be known to the husband, he should be conclusively presumed to be the father."

In North Carolina the supreme court held that —

"A child born in wedlock, though born within a month or a day after marriage, is legitimate by presumption of law; and where the mother was visibly pregnant at the marriage, it is a presumption *juris et de jure* that the child was the offspring of the husband."

And in *Rhyne v. Hoffman*, 6 Jones, Eq., 335, the court quote with approval a quotation from 1 Rolls, Abr., 358, and 2 Bac. Abr., 84, as follows: "That if a woman, big with child by A., marry B., and then the child be born, it is the legitimate child of B." It has been held in a large number of cases, both in England and America, that the wife is not a competent witness to prove non-access of the husband, whether the child was begotten before or after marriage. In *Rex v. Reading*, Lee Temp. Hardw., 83, Lord Hardwicke said:

"It must be of very dangerous consequence to lay it down in general that a wife should be a sufficient *sole* evidence to bastardize her child, and to discharge her husband of the burden of its maintenance."

Similar language is used by Lord Ellenborough in *King v. Luffe*, 8 East,

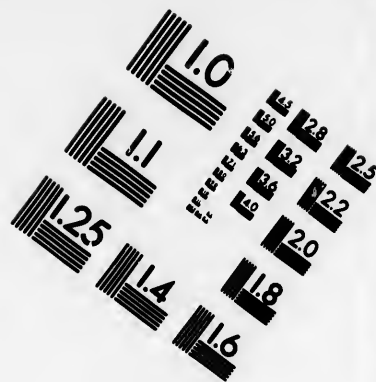
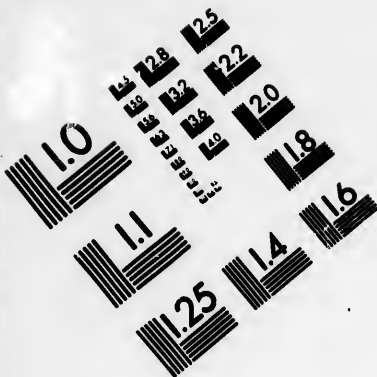
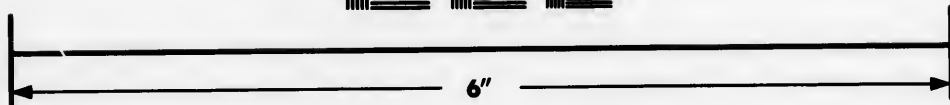
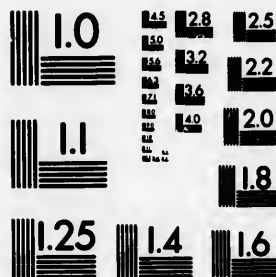


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193, and in various English authorities. The reason for this rule is stated in *Tioga Co. v. South Creek Tp.*, 75 Pa. St., 433, in the following language:

"That issue born in wedlock, though begotten before, is presumptively legitimate is an axiom of law so well established that to cite authorities in support of it would be mere waste of time. So the rule that the parents will not be permitted to prove non-access for the purpose of bastardizing such issue is just as well settled. Many reasons have been given for this rule. Prominent among them is the idea that the admission of such testimony would be unseemly and scandalous, and this not so much from the fact that it reveals immoral conduct upon the part of the parents as because of the effect it may have upon the child, who is in no fault, but who must, nevertheless, be the chief sufferer thereby. That the parents should be permitted to bastardize the child is a proposition which shocks our sense of right and decency, and hence the rule of law that forbids it."

This doctrine is recognized in *Parker v. Way*, 15 N. H., 45; *Davis v. Houston*, 2 Yeates, 289; *Page v. Dennison*, 1 Grant, Cas., 377; *S. C.*, 29 Pa. St., 420; and in that case the court, in addition, hold that —

"Whether the child is begotten in or out of wedlock, if marriage precedes the birth, the presumption of paternity is the same, and can only be bastardized by proof of non-access. The wife is not a competent witness to prove non-access on the part of her husband, and that her child, begotten before, but born during wedlock, was not begotten by him."

On the same point, see *State v. Wilson*, 10 Ired., 131, and *State v. Herman*, 13 Ired., 502, in both of which cases the pregnancy preceded the marriage. The cases are collected on this point in 1 Phil. Ev., 87, note, and the reason of the rule stated in the text as follows: "This rule is established, independently of any possible motives of interest in the particular case, upon principles of public policy and decency."

THE STATE V. REED.

(89 Mo., 168.)

BILL OF EXCEPTIONS: *Evidence — Juror.*

1. Evidence held competent.
2. All objectionable rulings of the trial court must be excepted to at the time, and made part of the bill of exceptions, or no error can be predicated on them on appeal.¹
3. The motion for a new trial must also be made part of the bill of exceptions; otherwise, no question can be raised on appeal as to misdirecting the jury.
4. A juror who is without prejudice or bias is competent, although he has expressed an opinion of guilt based upon rumor.

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Appeal from Cass Circuit Court.

Indictment for and conviction of larceny.

B. G. Boone, attorney-general, *H. L. Jarrott*, prosecuting attorney, and *Bailey & Burney*, for the state.

Wooldridge & Daniel, for appellant.

BLACK, J. Reed, the appellant, and Fredericks, were jointly indicted for stealing a horse, the property of Gentry. Upon a trial in the Cass circuit court appellant was found guilty, and sentenced to two years' imprisonment in the penitentiary.

1. The evidence of McDaniel, a merchant, to the effect that he had sold Reed boots and shoes, and that the latter wore a No. 6, was properly received. Other evidence that the tracks in the dust showed that the person who led the horse from the stable wore a boot or shoe of that size made the evidence of McDaniel relevant. While the merchant was not positive, and could only speak from his best recollection, still the evidence was competent. It had some tendency to identify the defendant as the person who took the horse from the stable. *State v. Bubb*, 76 Mo., 501. It was for the jurors to determine its value, and consider it with the other evidence.

Quaite, a witness for the state, was asked, on cross-examination, if he had not on a former occasion, and at a specified time and place, made statements, giving them in full, contradictory of his evidence on the witness stand, and he said he had not. The defendant called witnesses who testified that Quaite had made the alleged contradictory statements. The state, by way of rebuttal, recalled Quaite, and he was allowed, over the objections of the defendant, to give his version of what was said by him. The purpose of the cross-examination of the witness was to lay a foundation to impeach his credit. In all such cases the attention of the witness, as was done here, must be called to the time, place, and person involved in the contradictory statement. The object of this rule is that the witness may recollect and explain what was said, and for the purpose of making such explanation he may be recalled (1 Greenl. Ev., § 462), and for a like purpose he may be recalled by way of rebuttal. *State v. Winkley*, 14 N. H., 490.

2. The court gave five instructions, which cover every issue presented by the pleadings and the evidence. The defendant

asked no other or additional instructions, and made no objection to those which were given on the trial, and for the first time complained of them in the motion for new trial. The question is therefore presented whether these instructions ought to be reviewed here. The rule is well settled in civil cases that exceptions must be saved to the ruling of the court at the time the ruling complained of is made, and that it is not sufficient to make the objection for the first time in a motion for new trial. This rule applies to instructions as well as any other matter of exception. *Randolph v. Alsey*, 8 Mo., 656; *Dozier v. Jerman*, 30 Mo., 216; *Houston v. Lane*, 39 Mo., 495; *Waller v. Railroad*, 83 Mo., 608. It has also repeatedly been held that the same rules apply in criminal as in civil cases as to matters of exceptions, which become a part of the record only by bill of exceptions. *State v. Connell*, 49 Mo., 282; *State v. Marshall*, 36 Mo., 400; *State v. Sweeney*, 68 Mo., 96; *State v. Ward*, 74 Mo., 256; *State v. Williams*, 77 Mo., 310; *State v. Burnett*, 81 Mo., 121. In criminal cases in this court no assignment of errors, or joinder in error, is required, and it is made the duty of this court to proceed, "and render judgment upon the record." Section 1993, Revised Statutes. But this section has nothing to do with the method of preserving questions in the record. Other sections of the Revised Statutes of 1879 provide that the practice in civil cases shall apply in criminal cases as to impaneling jurors (section 1906) and compelling the attendance of witnesses (section 1907). In prescribing the order of trials in criminal cases, section 1908 provides: "Fourth, the court must instruct the jury in writing upon all questions of law arising in the case which are necessary for their information in giving their verdict;" and section 1921 is as follows: "On the trial of any indictment," etc., "for a criminal offense, exceptions to any decision of the court may be made in the same cases and manner provided by law in all civil cases, and bills of exceptions shall be settled, signed, sealed and filed as now allowed by law in civil actions," etc. It is manifest the fourth paragraph of section 1908, though appearing in the statutes for the first time in 1879, leaves section 1921 in full force. This section has been the statute law for many years.

Now, in the application of the general rules before stated,

and with the instructions and motion for exceptions, *State v. Du* it was said it insisted that the motion cannot be alleged in the jury." Mo., 461; and held that the court would not be bound by the time to the instructions.

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and with these statutes in full force, it has been ruled that instructions are not before this court for consideration where the motion for new trial is not incorporated in full in the bill of exceptions, though the instructions are contained therein. *State v. Dunn*, 73 Mo., 586; *State v. McCray*, 74 Mo., 303. So, it was said in *State v. Preston*, 77 Mo., 294: "It is also insisted that the court erred in giving instructions. This objection cannot be considered by us, for the reason that it is not alleged in the motion for new trial that the court misdirected the jury." The same ruling was made in *State v. Emory*, 79 Mo., 461; and in the case of *State v. Bayne*, 88 Mo., 604, it was held that two instructions asked by the defendant, and refused, would not be considered, because exceptions were not taken at the time to the ruling of the court. It must follow that the instructions given in this case cannot be reviewed.

3. A ground assigned for a new trial is that a juror, W. B. Reed, had previously formed and expressed the opinion that defendant was guilty of the charge made in the indictment. The affidavit of Mr. Wooldridge is that in a conversation with the juror just before the trial the juror said: "From what he knew and had heard, he had both formed and expressed an opinion, and, from his then knowledge and information, he believed the defendant was guilty, and that he would be in favor of sending him up for ten years." The juror in his affidavit says he did have a conversation with Mr. Wooldridge at the depot, but he did not use the language attributed to him; that he said: "From what I have heard, I do not believe I can be one of the jurors, because, if the evidence should turn out like I heard it was, I think he ought to be sent up for ten years." He also states that he had never talked to any witness about the case; that he had conversed with no one about the facts except his wife and Wooldridge; that his wife told him what she had heard from another lady; and that it was the information thus received from his wife to which he had reference in the conversation with Wooldridge. The juror was accepted as a competent juror, without objection on the part of the defendant, after an examination in open court, and with full knowledge on the part of the defendant's attorneys as to what had been said between the juror and Mr. Wooldridge. The juror's affidavit is full, clear, and bears evidence of candor. We con-

clude with the trial court that all the information the juror had he received from mere rumor, and that he was without prejudice or bias. The judgment is therefore affirmed.

(All the judges concur, except Henry, C. J., who dissents as to so much of the foregoing opinion as holds that the instructions cannot be reviewed for failure to make objection, and save exceptions thereto, at the time they were given.)

NOTE.—*Bill of exceptions.*—In *Lererich v. The State*, 105 Ind., 277, some of the instructions given by the circuit court to the jury, and complained of, are not embraced in a bill of exceptions, but merely copied into the transcript by the clerk as a part of the proceedings at the trial, with following words entered on the margin of each: "Given and excepted to by the defendant, November 24, 1885. Steele & St. John for Defendant." The state raises the objection that these instructions are not properly in the record so as to present any question upon them here, and as the statutes provide that all exceptions in criminal cases, not saved by the entry of the clerk as a part of the proceedings in court, must be embraced in a bill of exceptions. And consequently the court held that there could be no question before them on these instructions copied into the transcript as above stated. On the bill of exceptions, see 5 Am. Cr. Rep., note, pp. 253-259.

SMITH V. THE PEOPLE.

(115 Ill., 17.)

BURGLARY: Ownership of premises—Indictment—Admissions of co-defendant—Presumptions—Recent possession of goods burglariously taken.

1. **INDICTMENT FOR BURGLARY—OWNERSHIP—AVERMENT—VARIANCE.**—In indictments for burglary the ownership may be laid in the occupant, whose possession is rightful as against the burglar. On an averment that the burglarious entry was into the dwelling-house of Francis Demling, there is no variance by proof that Demling rented from another the part of the house which was entered.
2. **ADMISSIONS OF CO-DEFENDANT.**—Statements made to a witness by one of two defendants to an indictment for burglary, while the other co-defendant is under arrest, are admissible against them.
3. **STOLEN GOODS—POSSESSION—EVIDENCE IN CASE OF BURGLARY.**—Possession of property recently stolen is *prima facie* proof that the person in possession committed larceny; and where both larceny and burglary are committed at the same time, the possession of such goods is also *prima facie* proof that the possessor committed the burglary.¹

¹See note.

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4. CO-DEFENDANT ADMISSIBLE AS WITNESS.—One of two co-defendants to the same indictment may take the stand in his own behalf, and his evidence may be considered by the jury as against his co-defendant.

Writ of error to the Criminal Court of Cook County, the Hon. R. S. Williamson, Judge, presiding.

J. R. Anderson, for the plaintiff in error.

George Hunt, attorney-general, and *Julius S. Grinnell*, state's attorney, for the people.

SHELDON, J. This was an indictment for burglary against George Smith, *alias* George Buckingham, and Thomas Dennis, upon which the latter was acquitted and the former convicted and sentenced to the penitentiary for fifteen years. The defendant convicted brings this writ of error.

The first point made by plaintiff in error is that there is a variance between the proof and indictment, in that the indictment charges the burglarious entry was into the dwelling-house of Francis Demling, while the proof shows that Demling did not own the house where he lived, but that he rented the first floor of the house, where was his room from which the property was taken, from one Groosheimer, the owner, who lived in the apartments above. In burglary the ownership may be laid in the occupant, whose possession is rightful as against the burglar. 2 Bish. on Crim. Proc., § 138. The rooms rented to Demling constituted the dwelling-house of Demling in the sense of the law. *Mason v. People*, 26 N. Y., 200. There is nothing in this point.

It is urged next that the court below erred in allowing the witness Bannen to give in evidence the statement made to him by the co-defendant, Dennis, at a time when Smith was under arrest. The statement was clearly evidence against Dennis, and was, therefore, properly admitted to go to the jury on the trial of the two defendants together. It is insisted that the possession by Smith of a part of the property stolen does not afford evidence to connect him with the burglary. It is admitted that the possession of property recently stolen is *prima facie* evidence that the person in possession committed the larceny. But it is claimed that there is a distinction in this respect between larceny and burglary. We see no foundation for any such distinction here. The proof shows that the lar-

ceny was committed at the same time with the burglary, and that about a month afterward Smith was found in possession of part of the articles stolen. The same person that committed the larceny no doubt committed the burglary; and whatever went to show one to be guilty of the larceny equally evidenced his guiltiness of the burglary.

The co-defendant, Dennis, offered himself as a witness in his own behalf, and testified as to a part of the articles stolen which had been in his possession, and which he had pawned; that Smith gave him the articles and hired him to pawn them. Upon the calling out of this evidence, defendant Smith made objection that the statements of the witness Dennis were only evidence in the latter's own behalf, and could not be used against Smith to convict him of the crime charged, which objection the court overruled. The court also refused to give the following instruction asked by Smith:

"The court instructs the jury as matter of law that the evidence of Dennis, the co-defendant of Smith, who is jointly indicted, and tried jointly with him, is evidence only against Dennis, and not against Smith, and the jury, in arriving at a verdict, cannot use the evidence of Dennis to convict Smith on the indictment in this case."

Such ruling of the court in respect of Dennis' testimony is assigned for error. The court's ruling in this respect was justified under the decision of this court in *Collins v. People*, 98 Ill., 584, where it was held—under the provisions of the statute that "no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime" (R. S. 1874, p. 410, § 6)—that a joint defendant in an indictment was a competent witness against his co-defendant,

Finding no error in the record, the judgment must be affirmed.

NOTE.—In the case of *State v. Peterson*, 67 Iowa, 564, it appears that on the night of the 7th of August, 1883, the jewelry store of J. W. Smith, at Union, Hardin county, was broken into and entered, and money, jewelry and watches, of the value of about \$700, were stolen therefrom. The defendant Peterson, and one Maurice and one Stephens, were arrested about three days after the crime was committed, at Moline, Illinois, with nearly all of the stolen property in their possession. They were brought to Hardin

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county and jointly indicted for the crime. They demanded separate trials, and the defendant Peterson was convicted and sentenced to the penitentiary for ten years. There was no direct evidence that the three persons named stole the money and property. The evidence shows, however, that they were traveling about the country together for a month or more preceding the time of the larceny. They were at Union, at Marshalltown, at Grundy Center, and at other places. They had no occupation or business. They each passed under one name at one place and another name at another place. When they traveled, they usually adopted that inexpensive mode of conveyance known as free rides on freight trains. They were at Marshalltown on the evening before the crime was committed, which place is some twenty miles by rail from Union, and there was a train from the former place to the latter early in the night. When arrested at Moline they pretended not to be acquainted with each other. They stopped at a hotel, and the defendant Peterson delivered a satchel, which contained most of the stolen goods, to the hotel clerk. After he was arrested he denied being the owner of the satchel.

The court, after stating the facts, say:

"There are numerous objections to the instructions of the court to the jury. With one single exception these objections are utterly without merit, and we cannot take the time to notice them in detail. The exception referred to is this: The court instructed the jury as follows: 'The defendant claims, and has offered testimony to prove, that he came into the possession of the goods in controversy in this case by finding them. If this be satisfactorily shown by the evidence, the defendant should be acquitted. It is only necessary for this explanation to be shown by a preponderance of the evidence, or to such extent as to leave it reasonably doubtful whether he acquired the possession by theft.'"

"In the case of *State v. Richart*, 57 Iowa, 245, it was held that an instruction that the presumption arising from the possession of property recently stolen must be overcome by a preponderance of evidence was erroneous, and that case was followed in *State v. Hopkins*, 65 Iowa, 240. The true rule, as stated in those cases, is that it is sufficient to acquit if the evidence is such as to raise a reasonable doubt whether the defendant honestly came into the possession of the stolen goods. This instruction is unlike the instructions which were disapproved in the two cases above cited. It is true that in one clause it is stated that it is only necessary to explain the possession by a preponderance of the evidence, but this is immediately followed by what may be regarded as explanatory of what is meant by a preponderance of the evidence; that is, that it is sufficient to acquit if the evidence leaves it 'reasonably doubtful whether he acquired the possession by theft.' Taking the whole instruction together, we think it is in substantial accord with the rule announced by this court in the cited cases."

See *State v. Shaffer*, 4 Am. Cr. R., 83 and note (59 Iowa, 200), wherein it is held that the possession of property recently stolen is not of itself sufficient to warrant a conviction of burglary.

Receiver of stolen property.—In regard to the presumption of guilt arising from the possession of property recently stolen in prosecutions against receivers of stolen property, the following cases are in point:

In the recent case of *Cook v. The State*, 16 Lea (Tenn.), 461, the defend-

ant was indicted for stealing two horses, and in a second count for receiving said horses, knowing them to have been stolen. After the evidence was introduced, the court instructed the jury, generally, that possession of property which is shown to have been stolen, recently after the theft, if unexplained, is evidence of guilt. Commenting upon this instruction, the court says: "It is now insisted that this instruction was erroneous, for the reason that such possession is only evidence tending to establish guilt of the larceny, and not of the felonious reception of the stolen property, and that the court should have confined said instruction to the first count of the indictment. No such instruction, however, was asked for, and if it had been, we are not prepared to hold that it would have been error to have refused it. This question has not been decided in this state, and probably has not arisen, from the fact that in such cases juries have seldom been instructed to designate upon which of the counts their verdict is found.

"It is argued with much force that unexplained possession of stolen goods recently after the fact raises equally as strong a presumption of guilt as to one offense as the other, as the possession of stolen property is often rapidly shifted, and no more common plea is set up by persons caught in the possession of stolen property than that they received it from some other person; although, as a general principle, a party guilty of stealing cannot be convicted of receiving the stolen goods. 2 Bish. Crim. Law, § 1095. Yet Mr. Wharton lays down the doctrine that if it be proved that the defendant not only received the articles, but also assisted in stealing them, he may still be convicted, provided some other person assisted in the theft, because the stealing and receiving are both felonies, and a theft by several is a theft by each. Whart. Amer. Crim. Law, § 1895; citing *Rex v. Dyer*, 3 East, P. C., 767; *Rex v. Atwell*, id., 768. The same author also lays it down as an established principle of criminal law that a conviction for receiving is good, although a conviction for stealing would have been sustained by the same evidence if the jury had so found. Id., § 1890. He further states the doctrine that the fact that the goods are found in possession of the party is good presumptive evidence of the fact of his having received them. Id., § 1892; citing *State v. Weston*, 9 Conn., 527; *State v. Brewster*, 7 Vt. Rep., 118. He further says that the presumption arising from this fact of possession, standing by itself, *except in cases of receiving stolen goods*, is too slender to support a conviction. Sec. 730.

"Burrill states the same principle as follows: 'The recent possession of stolen property may sometimes be referable, not to the crime of theft, but to another, though kindred, offense,—that of having received the property with a guilty knowledge of its having been stolen; and, in the opinion of an able writer, there can be little doubt that persons have been frequently convicted and punished for the former offense whose guilt consisted in the latter.' Hence he says the practice of joining counts for both offenses in the same indictment has become the established practice both in England and America. Burr. Crim. Ev., 456, 457."

In *The State v. Buller*, 89 Mo., 595, it is said that the possession by a person of stolen property recently after the theft raises a presumption that he stole it, but the mere fact of recent possession of stolen property, by a person who is charged with receiving stolen property knowing it to be stolen, does not raise a presumption that he had knowledge that it was stolen.

1. BURGLARIES brought by the jury, and received by the court, considered balanced.
2. ALIBI—his being in the place, and the process of him.

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PEOPLE v. GIBSON.

(58 Mich., 308.)

BURGLARY: *Alibi*—*Evidence*.

1. BURGLARY—BREAKING INTO HOUSE TWICE—DAYLIGHT.—Where parties break into a house in the night-time with intent to steal, and carry off a small part of the property therein, and subsequently return and re-enter in the night-time and carry off the balance, it will be considered a continuous burglary; and that it was daylight when the balance of the property was taken away will not affect the case.
2. ALIBI—CONTRADICTING DEFENDANT.—Where the accused testifies as to his being in another city on the night of the burglary and is interrogated as to seeing a procession there that night, the appearance of such procession may be shown by another witness in order to contradict him.

Error to Saginaw.

Moses Taggart, attorney-general, for the people.*John Hurst and Trask, Grout & Smith*, for the appellant.

MORSE, C. J. The defendant was convicted of burglary in the circuit court for the county of Saginaw. The evidence on the part of the prosecution, being principally that of one Alexander Frey, corroborated by his wife, was to the effect that on the night of July 4, 1883, the defendant proposed to said Frey, at whose home he was stopping, to go to the dwelling-house of one John Byrne, in Lakefield, Saginaw county, and go through it; that about 10 o'clock in the evening they proceeded to Byrne's house and defendant took out a pane of glass and entered, and handed out to Frey about thirty pounds of pork, which was taken to Frey's house; that between 3 and 4 o'clock in the morning defendant proposed to go and take the remainder of the property of Byrne at his house, and by threats and command forced Frey, who was under great fear, to go with him; that when he took the pork the first time he put the pane of glass back. When they arrived at the house the second time he took out the same pane again and entered the house as before, taking out and carrying away a large number of articles. Frey testified that when they took the things this last time it was daylight. At the close of Frey's testimony the defendant's counsel moved to strike out of the

case all the evidence relating to the last breaking, as it was shown to be a separate and distinct offense, and also for the reason that it occurred by daylight. The court denied the motion, which is assigned as error. The judge also instructed the jury in this connection: "I charge you that if this house was broken and entered in the night-time by some person, and with intent to steal, and a small portion of the property carried away, and then the party returned during the night-time and abstracted other portions of the property, that it was a continuance of the burglary;" and then proceeded to give a true definition of what was meant by night-time in the law; which portion of the charge above quoted was excepted to by defendant's counsel.

We think the two acts of taking property out of the house, and entering the house for that purpose, were in law but one transaction. It took place in one evening, and the mere fact that there was an interval between the taking of the pork and the other articles would not constitute two distinct and separate offenses. It would make no difference if it was daylight when the last things were taken out; for if the first breaking was in the night-time and the second entry also in the night-time, the taking out of the things after daylight would not change the character of the entry. And, taking into consideration the evidence of Mrs. Frey, there was sufficient proof to go to the jury that the "daylight" referred to by Mr. Frey was not the daylight of the law,—the light caused by the coming or rising sun. Even if the last breaking could be regarded as an offense separate and distinct from the first, it was, nevertheless, competent evidence. The whereabouts of the accused the whole of this evening was a legitimate subject of inquiry, especially when connected so closely as to time and place as these transactions were; in fact, a continuous transaction passing from the house of Frey to that of Byrne and back, though there was a rest between the two trips, both of which had the same object and were taken in the same company. It was in fact and in law, however, one continuous burglary. 2 Whart. Crim. Law, §§ 1592, 1593; *People v. Mead*, 50 Mich., 228.

The defendant was sworn as a witness in his own behalf, and testified that he went to Saginaw City, a distance of twenty miles, on the morning of the 4th of July and missed

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the train by which he intended returning home; that he stayed and witnessed the fire-works until near midnight and then walked home, reaching there about half-past 5 or 6 o'clock on the morning of July 5th; that he was not at Byrne's house at either time stated by Frey, and had no part in the burglary. On cross-examination he was asked if he saw the procession at Saginaw City, and replied that "he did, but took but little notice of it." When asked to describe the procession he said "he saw a German company of men and another company," but could not tell how they were dressed. Thought he saw a wagon fixed up with a lot of little children in it, but could describe nothing else that he saw.

In rebuttal, Albert Trask and other witnesses were permitted, under objection by defendant's counsel, to describe the procession at Saginaw City on that day as they saw it. This is also assigned as error. We can see no objection to the admission of this testimony. If the defendant had testified to seeing a procession there as he did, and there had been no procession, it would have been competent for the prosecution to show this in rebuttal; and it was equally competent, in our opinion, to show what the procession was composed of, as bearing more or less upon the truth of his statement that he was there and saw it. If the description of other witnesses agreed with defendant's it would certainly do him no harm, and if it disagreed radically it would be proper for the jury to consider it as a circumstance bearing upon the question whether he saw it as he had testified. It was offered to show that a large number of societies and organizations, as well as wagons and carriages, were in the procession, and to show that, if defendant had been in the city at the time he claimed he was and saw the procession, he could have given a better description of it. It was competent for this purpose. If it fell short of showing this, as defendant's counsel claim, we fail to see how it could have hurt defendant's cause.

In his charge to the jury the court said, speaking of Mrs. Frey as a witness: "The character of the witness is important to be taken into consideration in determining the truth of the testimony. So far as the testimony of Mrs. Frey is concerned, she is the mother of four children. There appears nothing against her character in this case except the statement of the

defendant. Whatever may appear against her in this case, so far as her character is concerned, are matters that the defendant himself has brought before the court and jury."

In speaking in the same connection of the evidence of Frey, the court also said: "Now, with Mr. Frey, the other witness on the stand, there is nothing before the jury that I remember of, so far as his character or conduct heretofore is concerned, except that he is a man somewhat shiftless and has not succeeded in making any property. I don't know that that can be laid up against him; but some of the testimony shows that he is a shiftless man to some extent. Excepting that, and his own statement that he was an accomplice in this crime, is about all we have of the history of Mr. Frey. He appears to be a man who is at work now for Mr. Merrill, and has been at work there since. We know nothing against him, as I have stated."

Both of these statements of the court were excepted to. While it would have been more in accordance with correct practice for the court to have omitted these remarks, yet from the record there is no dispute, and can be none, but they were both correct statements as to the evidence affecting the character of the two witnesses, and we are not able to say that the comments of the circuit judge were such as to call for a reversal of the judgment upon that ground alone.

The judgment of the court below is affirmed.

(The other justices concurred.)

THE STATE V. STEVENS.

(67 Ia., 557.)

BURGLARY: Evidence—Acts and admissions of confederates—Practice.

1. **BURGLARY—EVIDENCE ON SEPARATE TRIAL OF ONE OF SEVERAL DEFENDANTS.**—Evidence of the acts and conversation of other parties indicted with defendant for burglary, tending to show that defendant and such parties were associates and confederates for the commission of the crime, and tending to connect defendant with its commission, are admissible on the separate trial of defendant.

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2. **ATTEMPT OF CRIMINAL TO ESCAPE FROM CUSTODY.**—An attempt or effort on the part of a party accused of crime to escape from custody may be shown as tending to establish his guilt.
3. **TRIAL — INSTRUCTION — FAILURE OF ACCUSED TO TESTIFY.**—Where no request is made at the trial to instruct the jury that they are not to consider the failure of the accused to testify on his own behalf, to his prejudice, the failure to so instruct will not be considered error.
4. **ADJOURNMENT.**—Pending the trial, the judge of a district court may adjourn the term, to be next held in another county, for one week, to give sufficient time to complete the trial, which, but for such adjournment, would proceed after the day fixed for the next term.¹

Appeal from Hardin District Court.

Defendant was convicted of burglary, and now appeals to this court.

Tom. H. Milner, for appellant.

A. J. Baker, attorney-general, for the state.

BECK, C. J. I. The defendant was indicted, with two others, for burglary committed by breaking into a jewelry store and taking goods and money of the aggregate value of \$678. Upon his request he was tried separate from his co-confederates.

II. Various objections were made to testimony on the trial, showing acts and conversation of the other persons indicted with defendant, which tended to establish familiar relations and association of all the parties; that they were in company about the time of the commission of the crime, and other matters tending to connect defendant therewith. Evidence as to certain bonds found in possession of the defendants was also made the subject of objection. All of these objections may be disposed of upon the consideration that the evidence tends to connect defendant with the crime, the commission of which was clearly established. It tends to show that defendant, and those connected with him, were familiar associates and confederates for the commission of crime.

III. Evidence was admitted, against defendant's objection, tending to show an attempt or effort on the part of defendant to escape from custody. It is admitted by counsel for defendant that an escape and flight may be shown as a fact tending to establish guilt; but it is insisted that an attempt to escape can-

¹ See note.

not be proved. We discover no distinction between an actual escape and an attempt to escape. Each equally tends to show a consciousness of guilt, and is therefore alike admissible against the accused.

IV. Certain instructions as to the effect of evidence of possession of property recently stolen are made the subject of criticism. They present the familiar rules upon this subject in language sufficiently clear and certain. The same remark may be made applicable to instructions applying the action of reasonable doubt to different branches of the case. Counsel, in their objections to these instructions, fail to recognize the obvious meaning of their language. The instructions present rules as they are laid down and recognized in decisions of the courts.

V. The defendant did not testify in his own behalf. His counsel now urge that the court erred in not instructing the jury that this fact was not to be considered to his prejudice. Had such instruction been requested, it doubtless would have been given. In the absence of this request, we do not think it was the duty of the court to allude to the matter. It cannot be presumed that defendant's case was prejudiced by his silence, in the absence of any allusion thereto by the state, the court, or any person connected with the case.

VI. Pending the trial in the district court, the judge made an order adjourning the term to be next held in another county, for one week. This was done in order to give sufficient time to complete the trial of this cause, which proceeded after the day fixed for the commencement of the next term had it not been adjourned. It is now insisted that the trial was had and completed during the time fixed for the court to be held in another county. But section 169 authorizes the judge, for sufficient cause, to adjourn a term before it is begun. The term following the one at which defendant's trial was commenced was lawfully adjourned, and nothing prevented the continuance of the trial during the time at which the next term would have been held had it not been adjourned. The statute does not fix a day for the ending of a term. It may continue until the next term in another county should be commenced.

We think defendant had a lawful and fair trial, and the evi-

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dence well supports the verdict. We discover no errors in the proceedings. The judgment of the district court is affirmed.

NOTE.—*Court opened and adjourned by sheriff in absence of judge.*—Court may be opened by a circuit judge on the first day of the term, and an order entered that if no circuit judge of that circuit be there at 5 o'clock P. M. of that day, the sheriff shall adjourn the court until the succeeding day. If at that time no judge is present, the sheriff, under the statute, may open and adjourn the court from day to day, by proclamation and by notice posted on the court-house door. *Bressler v. The People*, 117 Ill., 423.

THE STATE v. CLARK.

(89 Mo., 423.)

BURGLARY: *Dwelling-house, what is.*

BURGLARY—WHAT IS A DWELLING.—Under the laws of Missouri (Revision 1879, § 1309) an under-ground cellar, used for storing ice and beer, having no internal door of communication with the living-rooms in the upper stories of the same building, and not under the control and dominion of any occupant of the building, is not a "dwelling-house."

Appeal from Cooper Circuit Court.

Indictment and conviction for the larceny of a keg of beer from a dwelling-house.

W. M. Draffew, for appellant.

B. G. Boone, attorney-general, for the state.

RAY, J. At the November term, 1885, of the circuit court of Cooper county, the defendant, John Clark, and one Straub Young were jointly indicted for larceny committed in a dwelling-house in said county. The indictment was framed upon section 1309, Revision 1879, which provides that "if any larceny be committed in a dwelling-house, or in any boat or vessel, or in any railroad car, or by stealing from the person in the nighttime, the offender may be punished by imprisonment in the penitentiary not exceeding seven years." The indictment (omitting its formal parts) charges that at, etc., on, etc., one Straub Young and one John Clark, then and there, in a dwelling-house (to wit, the dwelling-house of a person to the grand

jurors unknown), feloniously did steal, take and carry away a certain keg of beer, the property of one August Dengolensky, then and there in said dwelling-house being, against the peace and dignity of the state.

Upon a trial of the cause before a jury, at the same term, the following, in substance, was the evidence in the case: "That on the 28th day of August, 1885, one Straub Young and John Clark did take from an ice-house one keg of beer; that said beer belonged to one August Dengolensky, and the house was the property of William Dengolensky and was situated in the city of Boonville; the defendants took the beer from the house in the day-time, and the beer was worth \$3.65; that the said ice-house was made of brick, and under the ground, and that it was built originally for an ice-house, but afterwards a floor was put in, leaving the part below as an ice-house and making four rooms above, without any internal communication between the rooms above and the ice-house below; that there was but one way of ingress and egress to the said ice-house, which was by a door upon the outside; that the occupants of the rooms above neither owned nor had any control over the ice-house and beer-cellar below; that said ice-house and beer-cellar, and the dwellings over it, were the property of and owned by William Dengolensky; and that a part of the ice-house was leased by him to one August Dengolensky, as and for a beer-cellar; and that two of the rooms over the ice-house were leased by him to one of the defendants, Straub Young, who occupied the same with his family as his dwelling-house at the time of the larceny charged in the indictment, and the remaining two rooms were leased by him to one Florence Jackson, who lived in the same at the time; that the only entrance to the said ice-house and beer-cellar was from the outside of the same, and that there was no door or opening of any kind between the ice-house and beer-cellar, and the rooms above occupied by the defendant Young and Florence Jackson, and that a floor separated the same; that said ice-house and beer-cellar, which are one and the same, were in the possession and under the control of one William Dengolensky, the owner thereof, and the said August Dengolensky, the lessee of a part thereof, and that neither of them had any control or resided in the rooms over and above said ice-house and cellar."

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At the close of the testimony the court, over the objections and exceptions of defendant, gave the following instruction for the state: "*Third.* If the jury shall find from the evidence that the witness Dengolensky kept his beer in the basement of a house; and that said basement was also used as an ice-house; and that the superstructure over said basement was composed of four rooms; and that two families were living in those rooms; and that each family occupied different rooms; and that the only means of entering the basement where said beer was kept was by a cellar door on the outside,—then the jury are instructed that said basement was a portion of a dwelling-house, and if the defendants took the beer mentioned in evidence from said basement, then they took it from a dwelling-house, within the meaning of the law."

The court then refused the following instruction asked by defendants, to which defendants excepted: "*First.* The jury are instructed that the defendants are indicted for larceny committed in a dwelling-house; and they are further instructed that if they find from the evidence that Straub Young, one of the defendants, was dwelling in and residing with his family in a portion of the house referred to in the indictment; and that the keg of beer mentioned in said indictment was in an ice-house which formed a part of, or was connected with, the dwelling-house in which Young was living with his family; and that said ice-house, at the time it is charged said beer was taken, was under the control of William Dengolensky; and that there was no door or internal communication between the part in which Young was living and the ice-house,—then the jury cannot find the defendants guilty of the offense charged in the indictment."

Upon the trial, as shown by the record, the defendant Straub Young was acquitted by the jury, but the defendant John Clark was found guilty as charged in the indictment, and his punishment assessed at imprisonment at the penitentiary for three years and four months, and, failing to secure a stay of execution, he is now in the penitentiary, as appears by the brief of the attorney-general for the state.

It may be well to premise that by section 1307, Revision, Statutes 1879, it is provided that "every person who shall be convicted of feloniously stealing, taking, and carrying away

any money, goods, rights in action, or other personal property or valuable thing whatsoever, of the value of \$30 or more, or any horse, mare, gelding, colt, filly, ass, mule or neat cattle, belonging to another, shall be deemed guilty of grand larceny. . . .” By section 1308 persons convicted of grand larceny shall be punished (as the case may require) by imprisonment in the penitentiary from five to seven years. Section 1318 provides that “every person who shall steal, take, and carry away any money or personal property or effects of another, under the value of \$30, not being the subject of grand larceny, without regard to value, shall be deemed guilty of petit larceny, and, on conviction, shall be punished by imprisonment in the county jail not exceeding one year, or by fine not exceeding \$100, or by both such fine and imprisonment.” And section 1319 provides that “if, upon the trial of an indictment for grand larceny, the evidence shows the value of the property taken would constitute a case of petit larceny, the defendant may be convicted of that offense.” It may be further premised, in the same connection, that while section 1309 does not, in express terms, declare that the perpetrator of “larceny in a dwelling-house” shall be deemed guilty of grand larceny, yet it says that he may be punished (in like manner, that is) by imprisonment in the penitentiary not exceeding seven years; and in *State v. Ramelsburg*, 30 Mo., 26, the court, speaking through Scott, J., held that stealing committed in a dwelling-house was grand larceny within the meaning of a similar statute.

But the controlling, if not the only, question in this case is, whether the stealing of the keg of beer in question from the “ice-house or beer-cellar” in question was, under the evidence in the cause, “a larceny committed in a dwelling-house,” within the meaning of section 1309, *supra*, and the authorities applicable thereto.

An eminent text-writer (1 Whart. Crim. Law (8th ed.), §§ 683, 781), treating of burglary (a somewhat kindred crime), says that “the breaking and entering, to constitute a burglary, must be ordinarily into the dwelling-house of another; that is to say, the house in which the occupier and his family usually *reside*, or, in other words, dwell and lie in.” “As an introduction to the cases hereafter to be given in detail, it may be now stated, generally, that no matter to what use an out-building

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may be put, it is burglary to break and enter it if it is appurtenant or auxiliary to the dwelling-house, and is within such convenient distance from the same as to make passing and re-passing an ordinary household occurrence. . . . The question is, is it probable that the building is under the immediate personal care of its owner? If so, in view of the peril to life consequent upon a nocturnal attack on it, the offense is one against family peace and safety, as well as against property, and consequently rises to burglary." "A dwelling-house is deemed any permanent building in which a party may dwell and lie, and, as such, burglary may be committed in it. A set of chambers in an inn of court or college is deemed a distinct dwelling-house, for this purpose. So, even a loft over a stable used for the abode of a coachman, which he rents for his own use and that of his family, is a place which may be burglariously broken."

Another distinguished writer (Bish. St. Crimes (2d ed.), § 242), says that "the word 'dwelling-house,' the meaning of which is fully explained further on, includes, in the law of burglary, and generally in the law, a structure for business uses, whereof any internally connected room is occupied for sleeping and abode." The same author, in section 277, says that "the words 'dwelling-house' and 'mansion-house' are identical in legal writings, but 'house' is not quite the same. . . . The latter is of meaning somewhat larger than the others, though the difference is not quite definable. . . . As already seen, the meanings of these terms may vary with the subject, and their connections with other words; but, in general, they are stable in the criminal law. For example, in statutes against larceny from the dwelling-house, the term 'dwelling-house' has the same significance as in burglary." In section 278 the same author uses this language: "A 'dwelling-house' is the apartment, building, or cluster of buildings in which a man with his family resides. To explain: One need not so construct his habitation that all its rooms will be under one roof; therefore the word 'dwelling-house' embraces the entire congregation of buildings, main and auxiliary, used for abode." In section 280 this writer says that "if one part of a building is used for abode, it gives the character of dwelling-house to every other part to which there is an *internal communication*, even though,

according to the authorities, generally occupied by another person, for an entirely different purpose. . . . If there is no internal communication, the parts are to be considered as though they were distinct buildings." The same author, in section 283, uses the further language: "In reason, whether a man's abode consists of a cluster of separate buildings, or of separate rooms under one roof, the result is the same; and it is that the abode — the dwelling-house — extends only to buildings and rooms used either directly for habitation or as auxiliary thereto, with this single exception: that where the walls of the dwelling inclosed other premises connected by an internal communication with the rooms lived in, such premises, if not the abode of another person, are, though occupied by another, parts of the dwelling-house with which they connect."

In this same connection, also, we may quote a paragraph from the opinion of Judge Scott in the case of *State v. Ramelsburg*, 30 Mo., 28, which, like this, was an indictment for stealing from a dwelling-house, to this effect: "The same offense may be committed under circumstances which will greatly enhance its guilt. Property which is necessarily exposed to the depredations of offenders must be protected by severer punishment than that which may be guarded and protected. So, those who make a visit to a dwelling-house a screen to hide a theft should be punished more severely than one who would steal the same thing found in a place calculated to create a temptation to do the act. The one act is indicative of a much more depraved disposition in the offender than the other."

Tested by the rules enunciated in these authorities, it is manifest, we think, that the conviction and judgment in the case at bar cannot be upheld under the undisputed evidence in the cause. It clearly appears that the keg of beer in question, worth \$3.65, was stolen by said Young and the defendant Clark in the day-time, from the ice-house or beer-cellar in question, which formed the basement of the building above, which had four rooms, but without any internal communication between said rooms above and the said ice-house below; that there was but one way of ingress and egress from said ice-house, beer-cellar or basement, and that was by a door upon the outside; that the occupants and dwellers in the rooms or building above neither owned, possessed nor had any interest in or con-

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trol over said ice-house, cellar or basement, or the business or uses to which it was applied; that the same, and the dwelling over it, were the property of and owned by William Dengolensky, and that part of the ice-house, cellar or basement without any internal communication with the building or rooms above was leased to one August Dengolensky as and for a beer-cellar; that two of the rooms above mentioned were leased to Straub Young and the other two to Florence Jackson, who occupied the same as a dwelling at the time; that said ice-house was made of brick, and underground, and that it was built originally for an ice-house, but afterwards a floor was put in, leaving the part below as an ice-house and making four rooms above, but without any internal communication between the rooms or building above and the ice-house below; which, as before stated, had but one way of ingress or egress, and that by a door upon the outside; and that the dwellers in the building above, as before stated, had no interest, possession or control of the same or any concern with those using the same. It is quite clear, therefore, that the ice-house, beer-cellar or basement was not, in the language of the text-writers, under the immediate personal control of any of the dwellers above; and, that being so, there was nothing to make passing and repassing from said ice-house to the building above, in the language of the text-writers, an ordinary household occurrence on the part of the dwellers above; and, if that be so, the peril to life consequent upon a nocturnal attack upon it, much less an attack in broad daylight, apprehended by the text-writers and adjudged cases, does not exist in the case at bar; and, if so, there is nothing in the facts of the case, or the policy of the law, to make the offense in question, in the language of the books, one against family peace and safety, as well as against property; or, in other words, to convert a case of simple "petit larceny" into one of "grand larceny," within the purview of section 1309, *supra*; nor is there in the case at bar, in the language of Judge Scott, in delivering the opinion in the case of *State v. Ramelsburg*, 30 Mo., 28, anything like "a visit to a dwelling-house in order to screen or hide a theft," so as to render the defendant deserving of a severer punishment than that due to a case of simple petit larceny. It follows, therefore, that the trial court erred in giving the instructions asked for on the part

of the state, and in refusing that requested by defendant; and for these reasons the judgment of the circuit court is reversed, and the defendant ordered to be discharged from further imprisonment by reason thereof.

(All concur.)

THE STATE V. SHIELDS.

(89 Mo., 259.)

BURGLARY OF DEPOT BUILDING: *Indictment need not allege incorporation of the company.*

INDICTMENT.— Under the laws of Missouri (R. S., § 1298), an indictment for burglary of or larceny from a railway depot need not allege the incorporation of the railway company, nor its ownership of the depot building.

Appeal from Jasper Circuit Court.

Indictment and conviction for the larceny of goods from a railway depot.

B. G. Boone, attorney-general, for the state.

J. D. Perkins, for the appellant.

NORRIS, J. At the March term, 1884, of the circuit court of Jasper county, the defendant was tried and convicted of burglary and larceny, from which judgment of conviction he has appealed to this court, and the only question raised on the appeal is as to the sufficiency of the indictment, which, omitting the formal parts, is as follows: "That Sheridan Shields, on the — day of —, 1883, at the county of Jasper and state of Missouri, did then there feloniously and burglariously break into and enter a depot building of the Missouri Pacific Railroad Company, there situate, the same being a building in which divers goods, merchandise and valuable things were then and there kept and deposited, with the intent the goods, chattels and valuable things in said depot building then and there being, then and there feloniously and burglariously to steal, take and carry away, and one pair of men's pants, of the value of \$10, of the personal goods and chattels of W. H. Johnson, then and there in said depot building being found, did then and there feloniously steal, take and carry away," etc.

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The indictment in question is framed on section 1293, Revised Statutes, which, among other things, provides "that any person who shall be convicted of breaking and entering any shop, store, . . . or other building, . . . in which there shall be at the time some human being, or any goods, wares or merchandise, or other valuable thing, kept or deposited, with the intent to steal or commit any felony therein, shall, on conviction, be adjudged guilty of burglary in the second degree."

The specific objection made to the indictment is that it neither alleges that the Missouri Pacific Railroad Company was a corporation, nor that, as such, it was capable of owning property. The precise question presented has not, so far as I am aware, been passed upon by this court; but the identical point was raised in the following cases, where it is held that it was not necessary to the sufficiency of an indictment that it should allege either that the owner of the property was a corporation, or that, as such, it was capable of owning property: *People v. McCloskey*, 5 Parker, Crim. R., 57; *Commonwealth v. Williams*, 2 Cush., 582; *State v. Scripture*, 42 N. H., 485; *State v. Rand*, 33 N. H., 216. See, also, 1 Whart. Pr., 378.

The evidence, which seems to be only partially preserved in the bill of exceptions, tended to show that the building burglarized was the depot of the Missouri Pacific Railroad Company, at Carthage; that defendant, being in the waiting-room thereof, broke the window in the partition between the waiting-room and the ticket-office, through which he entered and stole certain personal property therein kept or deposited.

We find no error in the record justifying our interference with the judgment, and it is hereby affirmed, in which all concur.

THE STATE v. KANE ET AL.

(63 Wis., 260.)

BURGLARY: *Indictment — Allegation as to value.*

1. BURGLARY — DEGREES OF OFFENSE — INFORMATION. — It is not incumbent on the state, in charging an offense under Revised Statutes of Wisconsin, 1878, section 4409, to allege the negative provided for in said

section, and contained in the language "not adjoining or occupied with a dwelling-house."

2. DESCRIPTION OF OFFENSE — SENTENCE. — Said language, though a material part of the description of the offense provided against in Revised Statutes 1878, section 4409, need not be alleged in the information; and where such language is omitted, and the accused found guilty, the court may sentence him.
3. VALUE OF GOODS. — In an information for burglary the value of the goods which the accused intended to steal need not be alleged.

Reported from the Circuit Court for Milwaukee County.

J. M. Clarke, district attorney, for the state.

W. H. Austin, for respondents.

ORTON, J. The defendants were tried and found guilty on the following information, to wit: That they on, etc., and at, etc., "the store-building of Henry Koch, Jr., as the administrator, etc., there situate, in the night-time of the same day, then and there unlawfully, feloniously and burglariously, did break and enter with intent then and there the goods, chattels and property of said Henry Koch, Jr., as administrator, then and there in the said store-building being found, then and there feloniously and burglariously to steal, take and carry away, contrary to the statute," etc. Pending a motion in arrest, the learned judge of the circuit court reported the case to this court as far as was necessary to present certain questions of law arising therein, by virtue of section 4721, Revised Statutes, for its decision. The questions so propounded are as follows: (1) "Whether or not it is incumbent for the state, in charging an offense under section 4409 of the Revised Statutes for 1878, to allege the negative provided for in said section, and contained in the language 'not adjoining or occupied with a dwelling-house.'" (2) "Whether said language is a material part of the description of the offense provided against in said section." (3) "Whether or not this court can properly sentence said defendants upon said information under said section." (4) "Whether or not said information properly charges any offense known to the law."

The several kinds or degrees of the general offense of burglary, as defined by our statute, are as follows: In section 4407, breaking and entering any dwelling-house in the night-time,

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with intent, etc., any person being lawfully therein, and the offender being armed with a dangerous weapon, etc. In section 4408, breaking and entering, in the night-time, any dwelling-house, with such intent, etc., *not being armed with a dangerous weapon*, etc. In section 4409, breaking into and entering in the night-time, any office, shop, or warehouse, or any other building, *not adjoining or occupied with any dwelling-house*, with such intent. In section 4410, entering in the night-time, without breaking, or breaking and entering in the day-time, any dwelling-house or out-house thereto adjoining and occupied therewith, or any office, shop, etc., with such intent. For the first grade of the offense as above defined the punishment is imprisonment in the state prison from five to fifteen years; for the second, from three to eight years; for the third, from one to five years; for the fourth, from one to three years, or in the county jail from six months to one year. Section 4411 does not create any new or other grade of burglary, but establishes only a rule of evidence by making any unlawful entry of a dwelling-house, or other building, with such intent, a *breaking* and entering. It is evident that this information was not drawn and cannot stand under any of these sections except section 4409, and the only ground taken by the learned counsel of the defendants why it cannot stand under that section, and does not describe the grade of burglary therein defined, is that the negative words, "not adjoining or occupied with any dwelling-house," are not stated in the information as an allegation of fact in the necessary description of the offense. Burglary at common law is "the breaking and entering into a dwelling-house, or a building immediately connected therewith, in the night, with intent to commit a felony."

The grade of the offense established by and described in section 4409 of our statute was unknown at the common law, and is a lower grade of the offense, by reason of its making a certain kind of burglary consist of breaking and entering a building which is neither a dwelling-house nor one immediately connected therewith; or, in the words of the section, a building "not adjoining or occupied with any dwelling-house," with such intent. In one sense it is proper to say that the above section creates and defines a new and distinct offense, different from burglary at common law, by extending the common law

offense to embrace buildings other than those mentioned therein. But, in another and stricter sense, it creates only a lower grade of the common law offense of burglary. Murder, at common law, in the same sense, is defined by general words of apt and strict meaning. But our statute, as well as the statutes of other states, have established and defined different grades of murder, as in the first, second and third degrees, each having its own special elements, and yet in each case it is murder. This distinction must be borne in mind when considering the necessity of alleging negative words, found in the statutory definition of the offense, or the different grades of the same general offense created by statute.

The rule asserted by the learned counsel of the defendants is undoubtedly correct, that every circumstance necessary to an exact description of the offense as defined by the statute creating it must be critically set forth. *In re Booth*, 3 Wis., 157. But this rule is limited to entire and distinct offenses created and defined by the statute. In such cases the indictment or information must fully and particularly describe the offense in all its essential elements or it is not described at all. But this rule cannot apply to different grades of the same general offense, where the higher grade is made to consist of certain special particulars or circumstances affirmatively expressed as the necessary ingredients of the offense, and a lower grade thereof is made complete by excluding certain elements of the higher grade by negative words. Charging the lower grade, and leaving out or omitting such elements of the higher, is a full and complete allegation of the lower grade, without alleging specifically that they are omitted, by the use of such negative words as the statute uses only for the purpose of creating it. The distinction is clearly apparent, although in some cases it has been either misapprehended or lost sight of. To illustrate:

In charging common law burglary, or burglary under sections 4407 and 4408, the breaking and entering a dwelling-house, or building immediately connected therewith, or adjoining and occupied therewith, must be explicitly alleged. If, however, the information charges the breaking and entering of a building which is not alleged therein to be a dwelling-house or a building so connected therewith, and all the essential

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ingredients of a lower grade of burglary are alleged, then it is clear that the lower grade is fully and completely charged. The higher grade of the offense is not charged because this essential element thereof is omitted; and the lower grade is charged because it is omitted. These reasons might as well, perhaps, have been omitted, because this rule has been repeatedly sanctioned by the decisions of this court, and is really not an open question in this state.

This court has followed the decisions of the courts of Massachusetts in the sanction of this rule in respect of this particular grade of burglary, and the necessity of alleging the negative words found in the statute creating it, and which statute was borrowed by this state from that; and therefore the decisions of that state have been held to be sufficient authority on the question. But to repeat the reason of the rule can do no harm, especially as the courts are somewhat in conflict on the question. The statute of Massachusetts, in respect to this grade of offense, was substantially like section 4409, Revised Statutes, and our statute was borrowed and copied therefrom.

In *Devoe v. Com.*, 3 Mete., 316, Chief Justice Shaw, after explaining the statute and pointing out this change of the common law offense in making the breaking of other buildings than dwelling-houses and buildings immediately connected therewith burglary, by the use of these negative words, says: "Supposing this to be the true construction of the statute, then the case is brought within the scope of a well-established rule, which is, that where there are several species of the same general crime, with more or fewer circumstances of aggravation, and subject to a gradation of punishments, it is not necessary in the indictment to negative those circumstances which would render it more aggravated. . . . On these grounds the court are of opinion that this indictment was not defective and invalid by reason of not alleging that the office therein mentioned was *not adjoining to or occupied with a dwelling-house.*"

In *Phillips v. Com.*, 3 Mete., 588, the same question was again raised and referred to as decided in the previous case. These cases are so decided, without much discussion, in analogy to and by the authority of *Com. v. Squire*, 1 Mete., 258, which was a case of arson or burning under the statutes making different grades of the offense and degrees of punish-

ment. Section 3 of the statute made it an offense of the highest grade to burn a certain class of buildings, and the subsequent section under which the indictment was drawn made it an offense of lower grade to burn certain buildings "other than those mentioned in the third section;" and it was held that the words of exception need not be alleged in the indictment.

In *Larned v. Com.*, 12 Metc., 240, the same question was again raised in respect to an indictment which failed to allege these negative words in charging the offense described in this section, and the same ruling is repeated, referring to the above cases, and explaining *Com. v. Tuck*, 20 Pick., 362, cited by the learned counsel of the defendants as establishing a different rule.

In *Lacy v. State*, 15 Wis., 15, the indictment was for burning a dwelling-house, and drawn under sec. 1, ch. 165, R. S. 1858, which makes three grades of the offense of burning a dwelling-house: (1) Where the life of any person shall be thereby destroyed; (2) when no life has been thereby destroyed; and (3) when there was "no person lawfully in the dwelling-house at the time;" and there were three grades of punishment. The allegation in the indictment pertinent to this question was that the person whose life was destroyed was *in said dwelling*. The lowest grade of the offense is when there is no person *lawfully* in the dwelling-house burned. The defendant was convicted of the higher offense. It was held by this court that the conviction could not be sustained for the higher grade of the offense, because the allegation was not that such person was *lawfully* in the dwelling-house at the time; but it was further held that the defendant might be convicted under the indictment, because it was not so alleged, and that the indictment was good under the last clause of the section, although it did not allege that there was *no* person lawfully in the dwelling at the time. This was equivalent to holding that the omission to allege that the person was lawfully in the dwelling-house was a sufficient allegation that no person was lawfully therein. The present chief justice, in the opinion, says:

"All the counts of the indictment, undoubtedly, charge the wilful and malicious burning of a dwelling-house in the night-

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time, but without a sufficient averment that the dwelling was lawfully occupied by any person at the time. The matters alleged show that the minor offense was committed, and, therefore, it may be punished as such. It was not necessary to aver that the dwelling-house was temporarily unoccupied, or to negative those aggravating circumstances which would constitute the higher statutory offense. . . . Upon this point we suppose the principle to be correctly stated in *Larned v. Com.*, 12 Metc., 240, 242."

After repeating the reasons given in that case for the rule, the chief justice cites also *Com. v. Squire*, 1 Metc., 258, and *Devoe v. Com.*, 3 Metc., 316, and *Curran's Case*, 7 Grat., 619.

In *Bell v. State*, 20 Wis., 599, the indictment was for burglary, and the allegations material to this inquiry were as to the fact of some person being in the dwelling-house "armed with a dangerous weapon" at the time, or "not being armed with a dangerous weapon." It was held that if the indictment had alleged that some person was in said dwelling-house, "being armed with a dangerous weapon," it would be good under sec. 9, ch. 165, R. S. 1858; but the indictment being silent on that question, it was good under section 10 of that chapter, which sections are the same as sections 4407 and 4408 of the present revision. Chief Justice Dixon said in his opinion that "such an indictment need not negative the being armed or arming with a dangerous weapon," and he cites in support of the principle, *Rex v. Pearce*, Russ. & R. C. C., 174, and *Rex v. Robinson*, id., 321, but omitted to notice the case of *Lacy v. State*, *supra*, which settled that question in this state. The brief of the attorney-general, however, cited all of the above cases, as also *Fleming v. People*, 27 N. Y., 329. In *State v. Kroscher*, 24 Wis., 66, the same question was raised as in *Lacy v. State*, *supra*, and that case was reaffirmed and approved. From the above it is clearly apparent that the precise principle involved in this case has been long established in this state, that such negative words need not be alleged in the information.

The only other question raised on the argument is that the information does not show that there was an intent to commit a felony, because the value of the property intended to be stolen is not stated so as to make the intended larceny a felony under the definition of our statute. In *Hall v. State*, 48 Wis.,

688, this precise question was decided, and it was held that it is not necessary to allege the value of the goods which the accused intended to steal, in an information for burglary.

It follows from the above that the questions reported by the learned judge of the circuit court must be, and are hereby, answered as follows: First question, No; second question, Yes, but it is not necessary to allege it in the information; third question, Yes; fourth question, Yes.

By the Court.—Ordered accordingly.

PEOPLE V. MCGILVER.

(67 Cal., 55.)

BURGLARY: Evidence of ownership — Variance.

1. EVIDENCE OF OWNERSHIP OF BUILDING — VARIANCE.—In a prosecution for burglary, committed in attempting to enter the house of H. Wempe, with intent to commit larceny, if on the trial G. Wempe testifies that his father owned the house, without giving evidence as to the first name or initial of the owner, it is competent for the jury to presume from such testimony that the name of witness' father is Wempe, and that for the purposes of the prosecution he was in possession of the building, and this will not constitute a variance, there being no proof that the elder Wempe's name was not H. Wempe.
2. EVIDENCE OF OTHER BURGLARY.—In a prosecution for burglary evidence is admissible to show that at the time of arrest the defendants were attempting another burglary, and also that there was found on the persons of defendants at the time of arrest part of the property taken from the room of the prosecutor, for the purpose of connecting the defendants with the first burglary.¹

Appeal from the Superior Court of the City and County of San Francisco, and from an order refusing a new trial.

John D. Whaley, for appellant.

Attorney-General Marshall, for respondent.

MYRICK, J. The appellant, McGilver, was accused jointly with one Mark M. Lay, of the crime of burglary, committed by entering the house of H. Wempe, on the 14th of June, 1884, with intent to commit larceny. The appellant was sep-

¹ See note.

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arately tried. On the trial one G. Wempe gave evidence concerning the ownership of the house. He stated:

"My father owns the house." "It is my father's and mother's; my father owns the house;" "the deed runs to my father and mother; my father and mother both own the lot, and my father and mother built the house; my father and mother own the house."

No evidence was given as to the first name (or initial thereof) of the owner. The owner was spoken of in the testimony as Mr. Wempe. The point is made on this appeal that the owner's name should have been proved as laid, and that the omission to prove that H. Wempe was the owner is fatal. It was competent for the jury to presume from the evidence of G. Wempe that his father's name was Wempe, and that he was in possession of the building, for the purposes of the prosecution. It does not appear that the elder Wempe's name was not H. Wempe, as laid; therefore a variance does not appear. Secs. 956, 1404, Penal Code; *State v. Bluck*, 31 Tex., 560.

It is claimed that the court erred in admitting evidence that McGilver and Lay, at the time of their arrest, were attempting to break into a jewelry store, a day or two after the burglary in question, and that the officers found burglars' tools in Lay's possession. In addition to the burglars' tools, the officers found on the person of each of the arrested parties articles which were identified as having been taken from Wempe's house. We see no error. The evidence tended to connect the parties with the Wempe burglary, and for that reason was admissible.

Judgment and order affirmed.

MORRISON, C. J., SHARPSTEIN, J., MCKINSTRY, J., ROSS, J., and MCKEE, J., concurred.

NOTE.—Evidence as to other offense, see *State v. Kepper*, 5 Am. Cr. R., 594, and *Swan v. Com.*, 4 id., 188 and note.

STATE V. TURNBULL AND OTHERS.

(78 Me., 392.)

COMPLAINT: *Construction—Allegation.*

COMPLAINT—ALLEGATION OF PLACE.—When all the sections of a penal statute, taken together, show that the act in question was intended to be forbidden only in a particular part of a river, the complaint must allege the act to have been committed in that part, and a complaint alleging the act to have been committed in the river generally is bad.

On exceptions by respondents from supreme judicial court, Lincoln county.

This was a complaint under Revised Statutes, chapter 40, section 43, against the respondents for omitting to keep their fish-weirs open during the weekly close-time. The respondents demurred to the complaint. The presiding judge overruled the demurrer, and the respondents alleged exceptions.

Roswell S. Partridge, county attorney, for the state.

George B. Sawyer, for the defendants.

EMERY, J. The provisions of section 43, chapter 40, Revised Statutes, particularly that requiring an opening through weirs during the weekly close-time, were evidently enacted for the protection of "migratory fishes." This complaint is for omitting to keep the weir open. Section 31 of the same chapter, however, expressly exempts certain waters "from provisions relating to migratory fishes," and among the waters so exempted are "so much of the waters of the Damariscotta river as are west of the railroad bridge near Damariscotta Mills." Section 43, therefore, cannot apply to that part of the Damariscotta river so excepted. All the acts and omissions forbidden by section 43 are not forbidden in that part of that river. They are still lawful or harmless there, however unlawful they might be in other parts of the same river. They are not *mala in se*, and are *mala prohibita* only in one part of the river, to wit, that east of the railroad bridge. The locality of such acts or omissions is therefore an essential element in constituting them an offense against the statute. To prove that they occurred in the Damariscotta river is not enough. They may properly occur in one part of the river. It must be

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proved that they occurred in the prohibited part to make them an offense. If the locality is an essential part of the offense itself, it is equally a part of the description of the offense, and should be alleged in any process charging the offense. This is not a case of a promise or excuse which a respondent may or may not show in defense. He is not even *prima facie* guilty until he is shown to have done or omitted in the forbidden part of the river.

The only statement of locality in this complaint is "in the waters of the Damariscotta river." The complaint, therefore, does not set out any offense *prima facie*. The presumption would be that the respondents acted or omitted lawfully, in that part of the river not forbidden to them. All the matters charged may have occurred in that part of the river. All the allegations may be true, and the defendant offer no excuse, and still no offense have been committed. The allegation of *contra formam statuti* is not an allegation of fact, but simply a statement of a logical result,—a result in law. If the premise is insufficient, as in this case, the result does not follow.

State v. Boyington, 56 Me., 512, cited for the state, was clearly a case of proviso or excuse. It was *prima facie* an offense to cast two ballots at a single election under any circumstances. There might, however, have been circumstances excusing it, and which could have been shown in defense. Such circumstances did not need to be negatived.

The relative situation in a statute of its different sections, clauses and phrases is not the criterion in determining such a question, though it seems to be sometimes so stated. It may frequently solve the question, but it does not always do so. The question is, after all, one of legislative intent. Was it the intent to create a general offense, *prima facie* committable by all persons, at all times, or in all places, or was it the intent to create a limited offense, committable only by particular persons, at particular times, or in particular places? If the former, the excusatory circumstances need not be negatived in the complaint. If the latter, the particulars of person, time or place should be alleged. In the *Boyington Case*, *supra*, the statute evidently created a general offense *prima facie* applicable to all elections and all circumstances. In this case the statute creates a limited offense,—limited by place as well as

in time. The act only becomes a crime when done in a particular place. The complaint should charge the act as done in that particular place. Whart. Crim. Law, § 380; *State v. Godfrey*, 24 Me., 232; *U. S. v. Cook*, 17 Wall., 168.

Exceptions sustained. Demurrer sustained.

PETERS, C. J., WALTON, DANFORTH, LIBBEY, and FOSTER, JJ., concurred.

STATE V. MCNEELY.

(92 N. C., 829.)

CONCEALED WEAPONS: *Costs — Indictment — Imprisonment for.*

IMPRISONMENT FOR COSTS.—There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs. He was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed for insolvent debtors and persons imprisoned for the costs and fine in a criminal prosecution and applied for his discharge. *Held*, that he was entitled to his discharge in all three cases.

Motion to discharge the prisoner from custody for the non-payment of costs, heard before Avery, judge, at spring term, 1885, of Burke superior court.

His Honor refused the motion and the prisoner appealed.

Attorney-General, for the state.

S. J. Ervin, for the defendant.

SMITH, C. J. The defendant came into court and pleaded guilty to the charge contained in the indictment, of carrying a deadly weapon concealed about his person, under section 1005 of the code. Thereupon an order was entered "that judgment be suspended on payment of the costs."

There were two other indictments against him for similar offenses, tried at the same term and terminating in the same way, in one of which he was sentenced to imprisonment for ten days, in consideration, as the judge stated at the time, that there were three convictions upon the same charge.

The defendant remained in custody at the end of which the prescribed fine and sections for failure to appear were issued, and the defendant was discharged. The motion was applied to for the discharge of the defendant from the custody of the sheriff.

The motion was refused. The defendant appealed from the judgment of the court, is, forbearance, "payment" of costs, and if this would be all the cost of confinement, several of counsel. tion, and ment in which se punishment must be the expense of costs, uncommitt others a ishment.

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The defendant served out his term of imprisonment and remained in jail for the space of twenty days additional, at the end of which he applied for and was allowed to take the oath prescribed for insolvent debtors and persons committed for the fine and costs of a criminal prosecution (Code, § 2967 and sections following), and was discharged. Afterwards a *capias* issued, under which he was arrested and gave bond for his appearance at the next term, when he moved the court for his discharge from custody, upon the ground that his imprisonment was for the costs in all the cases and his discharge applied to all.

The motion was refused and the defendant recommitted to the custody of the sheriff for the costs of the prosecution, from the judgment in which the defendant appeals.

The record does not show a judgment committing the defendant for the costs of this proceeding, unless it be inferred from the concluding words of the entry which suspends, that is, forbears to proceed to pass sentence for the criminal act on "*payment of the costs.*" The brief of defendant's counsel assumes a judgment committing for costs in each of the cases, and if this be a fair construction of the record, the conclusion would be manifestly correct that the discharge operates upon all the costs and exempts the convict from further personal confinement on account of them. Taking the entries in the several cases together, they seem to sustain this view of the counsel. There is a single sentence pronounced in one connection, and, for the reason given, an omission to proceed to judgment in the others "on payment of the costs," the meaning of which seems to be that the ten days' confinement shall be full punishment for all the offenses, but the costs incurred in all must be paid. The accused was, therefore, in custody after the expiration of the ten days for the non-payment of all the costs, under an implied, if not positive and direct, order of committal; and this, so far as we can see, applies as well to others as to that indictment under which he has received punishment.

The oath and discharge, then, must have the effect of exempting the accused from further liability to imprisonment for the costs, and he was entitled to his discharge. There was error in refusing it. Let this be certified.

Error.

Reversed.

PEOPLE V. RICHARDS.

(87 Cal., 412.)

CONSPIRACY: *Information.*

1. FORM OF INFORMATION FOR CONSPIRACY.—An information for a conspiracy need not be against conspirators jointly, and is therefore not insufficient because it is against a single individual.¹
2. CONSPIRACY TO ROB.—A conspiracy to compel a person to sign his bank check, and then to take it forcibly from him, constitutes a conspiracy to rob.

Appeal from a judgment of the Superior Court, Santa Clara County.

Attorney-General Marshall, H. C. Moore and J. H. Campbell,
for appellant.

Herrington & Bane, for respondent.

McKINSTRY, J. The superior court sustained a demurrer to an information, which is in words and figures as follows:

"*In the superior court, etc.* John Richards is accused by the district attorney of the county of Santa Clara, state of California, by this information, of conspiracy, committed as follows: The said John Richards, on or about the 9th day of September, A. D. 1884, at the county and state aforesaid, did conspire with one David Davis, feloniously and by means of force and fear, to take certain bank checks to and of the value of \$15,000 from the person and immediate presence of one Henry Miller, the owner thereof, against the will of said Henry Miller, and immediately theretofore, and for the purpose of said taking, to compel said Henry Miller, by means of force and fear, to draw, make, and sign said checks; and said defendant, in pursuance of said conspiracy, and to effect the object thereof, did, on or about the date last named, proceed from the town of Hollister, in the county of San Benito, state of California, to the city of Gilroy, in the county of Santa Clara, in said state, and did arm and disguise himself, and, on the 13th of September, 1884, did set forth from said city of Gilroy along the road leading therefrom to the certain place in the county last aforesaid known as 'Pacheco Pass,' there to lie in wait for said Henry Miller, and consummate the purpose of

¹ See note.

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said conspiracy, contrary to the form, force and effect of the statute in such cases made and provided, and against the peace and dignity of the people of the state of California."

From the judgment on demurrer the people appealed. Counsel for respondent make the point, "There must be two persons, at least, charged jointly *as defendants* in every information for conspiracy;" and adds: "To the general rule there is this only exception: one can only be charged or convicted of conspiracy when he is charged to have conspired with persons 'unknown,' or beyond the jurisdiction of the court." As supporting the point, respondent cites Penal Code, 1160, n; Russ. Cr., §§ 492-548; 2 Bish. Crim. Law, §§ 188, 189; 1 Bish. Crim. Proc., §§ 963, 964. The note to section 1160 of the Penal Code merely lays down certain propositions, not necessarily involving the one here presented, and refers to adjudications (mentioned in the text-writers or directly cited by respondent) to sustain such propositions. We have seen no edition of Russell on Crimes divided into *sections*. In the eighth American edition of that work (Davis and Metcalf) it is said:

"From the nature of conspiracy it is an offense which cannot be charged to have been committed by one person alone. And upon this ground it has been holden that a prosecution for a conspiracy cannot be maintained against a husband and wife only," etc. Vol. 2, p. 690.

No one can dispute, or ever has disputed, that the offense cannot be committed by one alone, and it would seem that the husband and wife were one, in the sense that they could not conspire without the co-operation of another, at least. Section 189 of 1 Bishop's Criminal Law does not bear upon the point, nor does section 183 help to solve the precise question. By way of *argument*, it may be said, *because* one cannot commit a conspiracy, or because when two are charged as defendants the acquittal of one operates an acquittal of the other, therefore the indictment must be against two persons, with the exceptions that one may be informed against if it be stated in the information that the other conspirator is dead or unknown, or out of the state. The argument may be given such force, if any, as it is entitled to. But the one hundred and eighty-eighth section is cited by counsel as authority to the point that

at least two *must* be charged "as defendants." It is enough to say that Mr. Bishop draws no such inference from the premises by him laid down. Sections 963 and 964 of 1 Bishop's Criminal Procedure treat of "Steps Where Private Person Prosecutes," and "Steps if Prosecuting Officer." They do not speak of conspiracy at all. At section 464, volume 1, Mr. Bishop quotes Starkie:

"An indictment for conspiracy cannot charge the offense against one only, for the very nature and essence of the crime exclude the idea of its commission by a single individual. But the indictment may allege that the defendant, *together with other persons*, committed the offense."

Bishop adds:

"So that even here there is no legal necessity for proceeding *jointly* against the two or more conspirators."

And in section 225 of the Criminal Procedure, volume 2, the same learned writer very clearly intimates his opinion that upon principle, when two or more conspirators are living and within the jurisdiction, one of them may be separately indicted. He says:

"The conspirators may, as of course, be jointly indicted; nor, if they are, will the court generally direct that they be separately tried. But if one of two dies, the living one may be indicted and tried; and it is the same of a known conspirator where the other is unknown, and probably it is legally competent to indict known and arrested conspirators separately, while yet the court might interfere to correct so inconvenient and unusual a course."

If one can be separately indicted, two being named in the indictment as conspirators, the *indictment* is sufficient as against demurrer, whatever action the court might assume to take to prevent the practice.

In support of his point respondent's counsel also cites 1 Whart. Crim. Law, § 431; Whart. on Precedents of Indictments, 607-673; Whart. on Crim. Ev., § 393. At section 1388 of his Criminal Law, Dr. Wharton says:

"A conspiracy must be by two persons at least. One cannot be convicted of it unless he has been indicted with persons to the jurors unknown."

And the same learned writer employs similar language in a

note to the Wharton's in the citation a note to the cites 1 Hav ions. Assu ins' Pleas that under be guilty o was mainta p. 448. Of only holds C. conspire unknown, than A., B A. guilty, 3 H. L. Ca persons. I overt acts court was vent the de dictment, the courses everywhen statutory lawful act ing in that ent in the is "Reg. v. it is merel on an act dictment a fendant m United which two Filley, de on the qu only dete ing consp unlawful

note to the form No. 607, inserted in his Precedents. As to Wharton's Criminal Evidence, here, again, there is some error in the citation. Section 393 does not relate to the subject. In a note to the statement in section 1388, above quoted, Wharton cites 1 Hawk., ch. 72, and a large number of reported decisions. Assuming that by "Hawk., ch. 72," is intended 1 Hawkins' Pleas of Crown, chapter 72, it is there only laid down that under the statute (21 Edw. I.) one person alone cannot be guilty of conspiracy, and therefore no prosecution under it was maintainable against a husband and wife only. Sec. 8, p. 448. Of the cases cited, *Regina v. Thompson*, 5 Cox, Cas., 166, only holds that where an indictment charged that A., B. and C. conspired together with divers other persons to the jurors unknown, and no evidence was offered affecting other persons than A., B. and C., and the jury acquitted B. and C., but found A. guilty, A. was entitled to an acquittal. In *Reg. v. Mulcahy*, 3 H. L. Cas., 306, the defendant was indicted with five other persons. Mulcahy demurred to the indictment, because the overt acts were not properly set out. The judgment of the court was that the objection was not sufficient in law to prevent the defendant from being compelled to plead to the indictment, and the house of lords affirmed this judgment. In the course of an opinion, Mr. Justice Willes said — what is everywhere admitted — that a conspiracy is (in the absence of statutory limitations) an agreement of two or more to do an unlawful act, or a lawful act by unlawful means. There is nothing in that case to uphold the view of counsel for the respondent in the case at bar. If "*R. v. Denton*," cited by Wharton, is "*Reg. v. Inhabitants of Denton*," 1 Dears. C. C., Reserved, p. 3, it is merely to the effect that where an indictment is framed on an act of parliament, and the act is repealed after the indictment and before plea pleaded, a judgment against the defendant must be arrested.

United States v. Cole et al., 5 McLean, 513, was a case in which twelve persons were indicted for conspiracy with one Filley, deceased. There is no intimation in the report bearing on the question now before us. *Com. v. Irwin*, 8 Phila., 380, only determined that to justify a conviction on a count charging conspiracy, the jury must be satisfied that there was an unlawful combination by the defendant with at least one other

person. In the note to section 1388 of Wharton's Criminal Law, in which the foregoing cases are cited, reference is made to section 305 of Wharton's Criminal Pleading and Practice, where it is said:

"In an indictment for conspiracy, less than two cannot possibly be joined; a wife and husband together not being sufficient. . . . But it is clear that one defendant may be tried alone when his co-conspirators are alleged to be unknown, or when such co-conspirators are *dead or absent or previously convicted*."

From section 305 we are referred to section 755 of the same book. There the rule is laid down:

"In riot or conspiracy there cannot be a conviction of a single defendant, coupled with an acquittal of co-defendants, unless there is an allegation and proof of the co-operation of parties not indicted."

In a note to section 305, in addition to the case of *United State v. Cole*, reference is given to *Reg. v. Gompertz*, 9 Q. B. D., 824; *Com. v. Manson*, 2 Ash., 31; *State v. Sam*, 2 Dev., 569; and *State v. Covington*, 4 Ala., 603. In *Reg. v. Gompertz*, several persons were indicted together. It was held that, where all are convicted, if one shows himself entitled to a new trial on grounds not affecting the others, a new trial should be granted to all. In *Com. v. Manson*, the action of the court in denying a separate trial to one of two persons jointly indicted for a conspiracy was approved. *The State v. Sam*, 2 Dev., 569, is an interesting case, because of the able and learned opinion rendered. But there, too, the actual point decided was that on an indictment for conspiracy against two the acquittal of one is the acquittal of the other. Nothing is said in the opinion which directly sustains the view contended for in the present case, that an indictment cannot be sustained wherein the single defendant is charged to have conspired with another *named person*, unless it is averred that the latter is dead or out of the jurisdiction, etc. *The State v. Covington*, 4 Ala., 603, only holds that where several are indicted and found guilty of a conspiracy, a motion in arrest of judgment will be entertained at the instance of any one, although the others are not in court and may have escaped from custody.

In addition to the text-books above mentioned, counsel for

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respondent also cites *Rex v. Kinnersley*, 1 Strange, 193; *State v. Egan*, 10 La. Ann., 698; *People v. Olcott*, 1 Amer. Dec., 168; 2 Johns. Cas., 301; and *State v. McDonald*, 10 Amer. Dec., 691; 1 McCord, 532. *Rex v. Kinnersley* decides that where two are indicted for a conspiracy, and one only appears and pleads to the issue, and is found guilty, judgment shall be given against him before the trial of the other. The Louisiana case holds that a judgment against one indicted for a riot, with three co-defendants and "divers other persons unknown," will not be arrested because his co-defendants were found "not guilty." *Non constat* but he may have been guilty of a riot with the persons unknown. It was held in *People v. Olcott* that where one of three persons, engaged in conspiracy, died before trial, and another was acquitted, the survivor might be tried and convicted. *State v. McDonald* was a case where the indictment charged that McDonald and another, "together with divers other persons, to wit, to the number of five," had committed the crime of riot. A motion in arrest of judgment was made "simply on the ground that the names of the others *should have been given*, or, if unknown, that fact should have been expressly stated." In South Carolina a riot could not be committed by less than three persons, and the court sustained the objection taken to the indictment; holding, in effect, that the names of the "others" should have been given, or their names declared to be unknown. We so understand that case. It is true, the reporter states the indictment was against the defendant and *two* others, charging that they "together with other persons," etc. But it is also stated that the grand jury found a true bill against the defendant "and *one* other only." If the statements could be construed to mean that the two indicted were charged to have committed the riot with a third person *named*, "togeth: with others," etc., the objection to the indictment would not have been sustained, because the name of a third person was given. In the last case the court said:

"The names of third persons, if they are necessary to the constitution of the offense, or constitute a necessary part of its description, should, if known, be *inserted*."

In a note the compiler adds:

"If several be indicted for a riot, and the jury acquit all but

two, they must acquit them also, unless it be charged in the indictment that these committed the riot, together with some other person *not tried on that indictment*."

(But, to prevent misapprehension, see Penal Code of California, section 404, which makes it possible for *two* persons to create a riot.)

It has sometimes been said that if an indictment charges a conspiracy against a defendant, committed with a person unknown, and the third person was in fact known, the prisoner must be acquitted. *State v. McDonald, supra*; Chit. Crim. Law, 212. But in *People v. Mather*, 4 Wend., 230; 21 Amer. Dec., 122, it was held that if the co-conspirators are stated to be unknown, the indictment is good, even although the names of the co-conspirators must actually have been known to the grand jury.

We have endeavored to go over carefully all the cases cited by respondent, or by the writers to whom he has referred. Of course, it is possible that we have failed to notice isolated expressions in the opinions of judges which might be deemed to favor the view of counsel, but we are not conscious of having overlooked such expressions. In no one of the cases, however, was it decided that an indictment against one charged as a conspirator was defective because the name of the third person with whom the defendant was charged to have conspired was given in the indictment. If there were no precedents for an indictment or information against one in which he was charged with another named person, the respondent would be entitled to the benefit of any inference which could fairly be drawn from that circumstance. But when a case is only new in instance, but not new in principle, the mere failure to discover a precedent in which the principle was applied to exactly the same facts is of little weight or consequence. *Pasley v. Freeman*, 3 Term R., 63; *Ashby v. White*, 1 Smith Lead. Cas., Hare & W.'s Notes, 440, 441. And, as we have seen, the styling one as "unknown" has been held sufficient, although the name of the person was, in fact, known to the grand jury. *People v. Mather, supra*. This must be construed to be an adjudication that a grand jury is not bound to join as defendants in one indictment all those who are known to them to have joined in the same conspiracy. Clearly, the information

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states facts (assuming that the nature of the conspiracy itself is sufficiently averred) which show that the defendant has been guilty of the offense. It requires two to conspire, but if two have conspired each is guilty of the conspiracy. True, if the name of the one is unknown, his name cannot be inserted in the indictment. But where such person is designated as "unknown," a particular individual is thus indicated; he is the person who is alleged to have joined with the defendant in the acts constituting the conspiracy. It is difficult to understand upon what ground the defendant can complain if the alleged co-conspirator is more distinctly identified by giving his name. As was said in *People v. Mather*, "an indictment should contain so much certainty as clearly to designate, not only the particular kind of offense, but the specific criminal act for which the accused has to answer." But there and elsewhere it has been held that the defendant was sufficiently informed of the person with whom he was accused of conspiring when such person was charged to be "unknown."

The alleged conspirator, not indicted, is a "*third person*" whose existence is necessary to the completion of the offense, and who must always be described with reasonable certainty; as, in robbery, the person robbed; in larceny, the person whose property is alleged to have been stolen. In case of conspiracy there must have been another person without whose co-operation the defendant informed against could not have committed the crime. Such person must be identified by name, or otherwise in such manner as that the defendant may know with what offense *he* is charged.

It may be urged that there is a species of injustice in selecting for prosecution one of two averred to be equally guilty, when for aught that appears both might have been prosecuted. But is this a matter of which the single defendant ought to be permitted to complain? As we have seen, it has been held that where two are indicted, one may be prosecuted to judgment before the trial of the other. We need not here consider the consequences in case the other shall subsequently be acquitted. We are asked to assume that both are within the jurisdiction of the court, because the information does not affirm that the conspirator died before the filing of the information, or that he had withdrawn from the state. Even if this should

be conceded, we cannot see why this should relieve the defendant from pleading to an information which gives him full notice of the facts which, if they exist, establish *his* guilt of the offense.

Counsel for respondent says: "There must be two men, at least, *convicted* (subject to the exception as to death, etc.) before the conspiracy is established;" citing *Dreux v. Domec*, 18 Cal., 83; *Com. v. Cobb et al.*, 14 Gray, 57; 2 Russ. Cr., 490; *State v. Buchanan*, 5 Har. & J., 317; 9 Amer. Dec., 534; Whart. Crim. Ev. (8th ed.), 392; Barb. Crim. Law, 248. Russell, at the page referred to, treats of "Forgery." Wharton, at the page referred to, treats of the competency of the wife of one defendant to be a witness against another defendant. *Dreux v. Domec*, 18 Cal., 83, was an action for malicious prosecution. We are unable to see what bearing *Com. v. Cobb et al.*, 14 Gray, 57, has upon the proposition of counsel, and except that *State v. Buchanan*, 9 Amer. Dec., 534, was a prosecution for conspiracy, that case seems to have no relation to the proposition here asserted. None of the cases last cited are to the point that the conspiracy cannot be established *as against the one indicted*, who is charged to have conspired with another not indicted. Barbour in his Criminal Law, 248, speaks of conspiracy, but seems to add nothing to what has already been said with respect to the precise point under consideration. In *Adams v. The People*, 9 Hun, 89, the indictment charged that Adams, the sole defendant, "conspired with one Lamb" to defraud. Lamb had been previously convicted of the same offense, but this did not appear on the face of the indictment, but was only shown as a fact when Lamb was offered as a witness for the prosecution. The court held him competent, as he had been convicted of a misdemeanor, not of a felony. Adams was separately indicted, tried and convicted. No objection was taken to the indictment by demurrer or in arrest of judgment.

We are not, however, without the authority of adjudications directly sustaining the course pursued by the district attorney in the present case. In *Heine v. Com.*, 91 Pa. St., 145, Heine was charged with having "with one Henry Weilo conspired," etc. The objection was taken that Heine alone was charged. The court said it is strictly true that a conspiracy is in its nat-

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ure joint, and that one alone cannot be guilty of the offense. "Nevertheless, one of two or more conspirators may be separately indicted, tried and convicted. 3 Chit. Crim. Law, § 1141. Therefore, that Weile has not been indicted with Heine can make no difference, if it sufficiently appears from the record that he was a confederate."

In *United States v. Miller*, 3 Hughes, C. C., 553, the information charged a conspiracy by three persons, Miller, Lee and Gettslick. Lee was dead, and Gettslick was already under conviction "for an act committed in furtherance of the conspiracy charged." The learned judge said:

"It is not the practice of the government to prosecute any person to conviction for more than one of the same *series of offenses*. Hence *there is no indictment here* except against Miller. . . . The particular question arising on demurrer, therefore, is, will an information against him alone lie without joining Gettslick? . . . As there may thus be a severance in the trial, in the verdict, and in the judgment, we may conclude there may also be a severance in an indictment for a conspiracy, unless there be some reason peculiar to such an indictment plainly making the several proceedings improper. I can see no such reason. It will not do to say that, because two, at least, must be convicted of a conspiracy, and that one person who should be the only one convicted must be discharged, therefore two, at least, must be joined in the indictment. But that same reasoning would forbid the severance of the trial, and deprive any one of his right to be tried alone. If it be conceded that there may be a severance in the trial of persons jointly indicted for a conspiracy, it follows, as far as the reason just alluded to is concerned, that there may likewise be a severance in the indictment. Some of the text-writers say (*arbitrarily*) that indictments for conspiracy must be joint; but they give no reason, other than the one just stated, for their proposition, and it is difficult to find a reason. I do not think any sufficient reason exists."

The learned judge then proceeds to examine *United States v. Cole*, *People v. Mather*, *Rex v. Kinnorsley*, and *Rex v. Nichols*, 13 East, 412. He finds nothing in those cases which would prohibit the indictment of one of two known conspirators. Our conclusion upon the point is that the information is not

insufficient because it is against a single defendant and the name is given of the person with whom he is charged to have conspired.

In addition to the objections above considered, respondent claims that no crime is charged, inasmuch as a conspiracy to compel one to sign a bank check and then to take it from him by force is not a conspiracy to rob." "Robbery is the taking of personal property from the person of another by means of force." Penal Code, § 211. "Personal property" includes things in action and evidences of debt. Penal Code, § 7. It is a *conspiracy to rob*, even although the conspiracy include an agreement to compel the making of the checks which are to be taken by force from the person. It is part of the unlawful agreement that a robbery shall be accomplished.

Judgment reversed and cause remanded, with direction to the court below to overrule the demurrer and require the defendant to plead to the indictment.

MORRISON, C. J., MYRICK, J., ROSS, J., THORNTON, J., concurred.

McKEE, J., concurred in the judgment.

NOTE.—See *Thomas v. The People*, 5 Am. Cr. R., 127 and note.

EX PARTE BAIN.

(121 U. S., 1.)

CONSTITUTIONAL LAW: *Indictment—Amendment—Habeas corpus.*

1. **INDICTMENT—JURISDICTIONAL.**—The declaration of article V of the amendments to the constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner in such cases without indictment or presentment by a grand jury, duly impaneled, describing an offense against the law for which the party charged may be punished.
2. **NO AMENDMENT THERETO BY COURT OR PROSECUTOR.**—When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact

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that the court may deem the change immaterial, as striking out of surplus words, makes no difference. The instrument, as thus changed, is no longer the indictment of the grand jury which presented it.

3. THIS IS THE RULE AT COMMON LAW, AND IS THE REQUIREMENT OF THE CONSTITUTION.—This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the constitution above recited, which would be of little avail if an indictment once found can be changed by the prosecuting officer, with consent of the court, to conform to their views of the necessity of the case.
4. SAME—TRIAL ON SUCH INDICTMENT VOID.—Upon an indictment so changed the court can proceed no farther. There is nothing (in the language of the constitution) which the prisoner can “be held to answer.” A trial on such indictment is void. There is nothing to try.
5. SAME—PRISONER CONVICTED ON, DISCHARGED ON HABEAS CORPUS.—According to principles long settled in this court the prisoner who stands sentenced to the penitentiary on such trial is entitled to his discharge by writ of *habeas corpus*.

This was a petition for a writ of *habeas corpus*. The case is stated in the opinion of the court.

Mr. Richard Walke and *Mr. W. W. Crump*, for the petitioner. *Mr. L. R. Page* was with them on the brief.

Mr. Augustus H. Garland, attorney-general, and *Mr. John Cullett Gibson*, district attorney for the eastern district of Virginia, opposing.

Mr. Justice MILLER delivered the opinion of the court.

This is an application to this court for a writ of *habeas corpus* to relieve the petitioner, George M. Bain, Jr., from the custody of Thomas W. Scott, United States marshal for the eastern district of Virginia. The original petition set out with particularity proceedings in the circuit court of the United States for that district, in which the petitioner was convicted, under section 5209 of the Revised Statutes, of having made a false report or statement as cashier of the Exchange National bank of Norfolk, Virginia. The petition has annexed to it, as an exhibit, all the proceedings, so far as they are necessary in the case, from the order for the impaneling of a grand jury to the final judgment of the court, sentencing the prisoner to imprisonment for five years in the Albany penitentiary. Upon this application the court directed a rule to be served upon the

marshal to show cause why the writ should not issue, to which that officer made the following return:

"Comes the said Scott, as marshal aforesaid, and states that there is no sufficient showing made by the said Bain that he is illegally held and confined in custody of respondent; but, on the contrary, his confinement is under the judgment and sentence of a court having competent jurisdiction to indict and try him, and he should not be released; and respondent prays the judgment of this court that the rule entered herein against him be discharged, and the prayer of the petition be denied."

The attorney-general of the United States and the district attorney for the eastern district of Virginia appeared in opposition to the motion, and thus the merits of the case were fully presented upon the application for the issue of the writ.

Upon principles which may be considered to be well settled in this court, it can have no right to issue this writ as a means of reviewing the judgment of the circuit court, simply upon the ground of error in its proceedings; but if it shall appear that the court had no jurisdiction to render the judgment which it gave, and under which the petitioner is held a prisoner, it is within the power and it will be the duty of this court to order his discharge. The jurisdiction of that court is denied in this case upon two principal grounds; the first of these relates to matters connected with the impaneling of the grand jury and its competency to find the indictment under which the petitioner was convicted; the second refers to a change made in the indictment, after it was found, by striking out some words in it, and then proceeding to try the prisoner upon the indictment as thus changed. We will proceed to examine the latter ground first.

Section 5209 of the Revised Statutes of the United States, under which this indictment is found, reads as follows:

"Every president, director, cashier, teller, clerk or agent of any association who embezzles, abstracts or wilfully misapplies any of the moneys, funds or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment

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or decree; or who makes any false entry in any book, report or statement of the association with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person; or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who, with like intent, aids or abets any officer, clerk or agent in any violation of this section, shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten."

Section 5211 requires every banking association organized under this act of congress to "make to the comptroller of the currency not less than five reports during each year, . . . verified by the oath or affirmation of the president or cashier of such association, and attested by the signatures of at least three of the directors."

The indictment in this case, which contains but a single count and is very long, sets out one of these reports, made on the 17th day of March, 1885, by the petitioner, as cashier, and Charles E. Jenkins, John B. Whitehead and Orlando Windsor, as directors of the Exchange National Bank of Norfolk, a national banking association. The indictment also points out numerous false statements in this report, which, it is alleged in the early part of it, were made "with intent to injure and defraud the said association and other companies, bodies politic and corporate, and individual persons to the jurors aforesaid unknown, and with the intent then and there to deceive any agent appointed by the comptroller of the currency to examine the affairs of said association." Following this allegation come the specifications of the particulars in which the report is false, and the concluding part charges that the defendants, "and each of them, did then and there well know and believe the said report and statement to be false to the extent and in the mode and manner above set forth; and that they, and each of them, made said false statement and report in manner and form as above set forth with intent to deceive *the comptroller of the currency and the agent appointed to examine the affairs of said association, and to injure, deceive and defraud the United States and said association, and the depositors thereof, and other banks and national banking associa-*

tions, and divers other persons and associations, to the jurors aforesaid unknown, against the peace of the United States and their dignity, and contrary to the form of the statute of the said United States in such case made and provided."

The defendants, having been permitted to withdraw the pleas of not guilty which they had entered, were then allowed to demur to the indictment, and as it is important to be accurate in stating what was done about this demurrer, the transcript of the record on that subject is here inserted:

"UNITED STATES	}	Indictment for making false entries, etc.
v.		
GEO. M. BAIN, JR., JOHN B. WHITEHEAD, ORLANDO WINDSOR and C. E. JENKINS.		

"This day came the parties, by their attorneys, pursuant to the adjournment order entered herein on the 13th day of November, 1886, and thereupon the defendants, by their counsel, asked leave to withdraw the pleas heretofore entered, which being granted, they submitted their demurrer to the indictment, which, after argument, was sustained; and thereupon, on motion of the United States, by counsel, the court orders that the indictment be amended by striking out the words, '*the comptroller of the currency and*' therein contained.

"Thereupon, on motion of John B. Whitehead and C. E. Jenkins, by their counsel, for a severance of trial, it was ordered by the court that the case be so severed that George M. Bain, Jr., cashier and director, be tried separately from John B. Whitehead, Orlando Windsor and C. E. Jenkins, directors.

"Thereupon the trial of George M. Bain, Jr., was taken up, and the said defendant, George M. Bain, Jr., entered his plea of not guilty."

This was done December 13, 1886, thirteen months after the presentment of the indictment by the grand jury, and probably long after it had been discharged.

A verdict of guilty was found against Bain, a motion for a new trial was made, and then a motion in arrest of judgment, both of which were overruled. The opinion of the circuit judge, on the question which we are about to consider, delivered in overruling that motion, is found in the record.

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part of the body of an indictment can be amended after it has been found and presented by a grand jury, either by order of the court or on the request of the prosecuting attorney, without being resubmitted to them for their approval, is one requiring serious consideration. Whatever judicial precedents there may have been for such action in other courts, we are at once confronted with the fifth of those articles of amendment, adopted early after the constitution itself was formed, and which were manifestly intended mainly for the security of personal rights. This article begins its enumeration of these rights by declaring that "no person shall be held to answer for a capital, or otherwise infamous, crime, unless on a presentment or indictment of a grand jury," except in a class of cases of which this is not one.

We are thus not left to the requirements of the common law, in regard to the necessity of a grand jury or a trial jury, but there is the positive and restrictive language of the great fundamental instrument by which the national government is organized, that "no person shall be held to answer" for such a crime, "unless on a presentment or indictment of a grand jury."

But even at common law it is beyond question that in the English courts indictments could not be amended. The authorities upon this subject are numerous and unambiguous. In the great case of *Rea v. Wilkes*, 4 Burrow, 2527, tried in 1770, which attracted an immense deal of attention, Wilkes, after being convicted by a jury of having printed and caused to be published a seditious and scandalous libel, was brought up before the court of king's bench on a motion to set aside the verdict, on the ground that an amendment had been made in the language of the information on which he was tried. In the course of an opinion delivered by Lord Mansfield overruling the motion, he remarks, on this subject (page 2569), that "there is a great difference between amending indictments and amending informations. Indictments are found upon the oaths of a jury, and ought only to be amended by themselves; but informations are as declarations in the king's suit. An officer of the crown has the right of framing them originally; he may, with leave, amend in like manner, as any plaintiff may do."

Mr. Justice Yates, on the same occasion, said that indictments, being upon oath, cannot be amended (page 2570).

Hawkins, in his Pleas of the Crown (book 2, ch. 23, sec. 97), says:

"I take it to be settled that no criminal prosecution is within the benefit of any of the statutes of amendments; from whence it follows that no amendment can be admitted in any such prosecution but such only as is allowed by the common law. And agreeably hereto I find it laid down as a principle in some books, that the body of an indictment removed into the king's bench from any inferior court whatsoever, except only those of London, can in no case be amended. But it is said that the body of an indictment from London may be amended, because, by the city charter, a tenor of the record only can be removed from thence."

He further says, section 98:

"It seems to have been anciently the common practice, where an indictment appeared to be insufficient, either for its uncertainty or the want of proper legal words, not to put the defendant to answer it; but if it were found in the same county in which the court sat, to award process against the grand jury to come into court and amend it. And it seems to be the common practice at this day, while the grand jury who found a bill is before the court, to amend it, by their consent, in a matter of form, as the name or addition of the party."

This language is repeated in Starkie's Criminal Pleading, p. 287. There are, however, several cases in which it has been decided that the caption of an indictment may be amended, and we therefore give here the language of Starkie, p. 258, as describing what is meant by the phrase "caption of an indictment."

"Where an inferior court," he says, "in obedience to a writ of *certiorari* from the king's bench, transmits the indictment to the crown office, it is accompanied with a formal history of the proceeding, describing the court before which the indictment was found, the jurors by whom it was found, and the time and place where it was found. This instrument, termed a schedule, is annexed to the indictment, and both are sent to the crown office. The history of the proceedings, as copied or extracted from the schedule, is called the *caption*, and is entered of record immediately before the indictment."

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It will be seen that, as thus explained, the caption is no part of the instrument found by the grand jury.

Wharton, in his work on Criminal Pleading and Practice, sec. 90, says: "No inconsiderable portion of the difficulties in the way of the criminal pleader at common law have been removed in England by the 7 Geo. 4, ch. 64, secs. 20, 21; 11 and 12 Vict., ch. 46, and 14 and 15 Vict., ch. 100, and in most of the states of the American Union, by statutes containing similar provisions." He also cites cases in the English courts, where amendments have been made under those statutes, but they can have no force as authority in this country, even if they justified such amendments as the one under consideration.

No authority has been cited to us in the American courts which sustains the right of a court to amend any part of the body of an indictment without reassembling the grand jury, unless by virtue of a statute. On the contrary, in the case of *Commonwealth v. Child*, 13 Pick., 198, 200, Chief Justice Shaw says: "It is a well-settled rule of law that the statute respecting amendments does not extend to indictments; that a defective indictment cannot be aided by a verdict, and that an indictment, bad on demurrer, must be held insufficient upon a motion in arrest of judgment."

In the case of *The Commonwealth v. Mahar*, 16 Pick., 120, the court, having held upon the arraignment of the defendant that the indictment was defective, the attorney-general moved to amend it, and the prisoner's counsel consented that the name of William Hayden, as the owner of the house in which the offense had been committed, should be inserted, not intending, however, to admit that Hayden was in fact the owner. "But the court were of opinion that this was a case in which an amendment could not be allowed, even with the consent of the prisoner."

In the case of *Commonwealth v. Drew*, 3 Cush., 279, Chief Justice Shaw said: "Where it is found that there is some mistake in an indictment, as a wrong name, or addition, or the like, and the grand jury can be again appealed to, as there can be no amendment of an indictment by the court, the proper course is for the grand jury to return a new indictment, avoiding the defects in the first."

In the case of *The State v. Sexton*, 3 Hawks (N. C.), 184; S. C., 14 Am. Dec., 584, the supreme court of that state said: "It is a familiar rule that the indictment should state that the defendant committed the offense on a specific day and year, but it is unnecessary to prove in any case the precise day and year, except where the time enters into the nature of the offense. But if the indictment lay the offense to have been committed on an impossible day, or on a future day, the objection is as fatal as if no time at all had been inserted. Nor are indictments within the operation of the statute of jeofails, and cannot therefore be amended; being the finding of a jury upon oath, the court cannot amend without the concurrence of the grand jury by whom the bill is found. These rules are too plain to require authority, and show that the judgment of the court was right, and must be affirmed."

It will be perceived that the amendment in that case had reference to a matter which the law did not require to be proved, as it was alleged, and which to that extent was not material.

The same proposition was held in the New York court of general sessions, in the case of *The People v. Campbell*, 4 Parker's Crim. Cas., 386, 387, where it was laid down that the averments in an indictment could not be changed, even by consent of the defendant.

The learned judge who presided in the circuit court at the time the change was made in this indictment says that the court allowed the words "comptroller of the currency and" to be stricken out as surplusage, and required the defendant to plead to the indictment as it then read. The opinion which he rendered on the motion in arrest of judgment, referring to this branch of the case, rests the validity of the court's action in permitting the change in the indictment, upon the ground that the words stricken out were surplusage, and were not at all material to it, and that no injury was done to the prisoner by allowing such change to be made. He goes on to argue that the grand jury would have found the indictment without this language. But it is not for the court to say whether they would or not. The party can only be tried upon the indictment as found by such grand jury, and especially upon all its language found in the charging part of that instrument.

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While it may seem to the court, with its better instructed mind in regard to what the statute requires to be found as to the intent to deceive, that it was neither necessary nor reasonable that the grand jury should attach importance to the fact that it was the comptroller who was to be deceived, yet it is not impossible or very improbable that the grand jury looked mainly to that officer as the party whom the prisoner intended to deceive by a report which was made upon his requisition and returned directly to him. As we have already seen, the statute requires these reports to be made to the comptroller at least five times a year, and the averment of the indictment is that this report was made and returned to that officer in response to his requisition for it. How can the court say that there may not have been more than one of the jurors who found this indictment, who was satisfied that the false report was made to deceive the comptroller, but was not convinced that it was made to deceive anybody else? And how can it be said that with these words stricken out it is the indictment which was found by the grand jury? If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would have probably made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by a grand jury, as a prerequisite to a prisoner's trial for a crime, and without which the constitution says "no person shall be held to answer," may be frittered away until its value is almost destroyed.

The importance of the part played by the grand jury in England cannot be better illustrated than by the language of Justice Field in a charge to a grand jury reported in 2 Sawyer, 667:

"The institution of the grand jury," he says, "is of very ancient origin in the history of England — it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement

of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of the king and the rights of the subject, it often stood as a barrier against persecution in his name; until at length it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means not only of bringing to trial persons accused of public offenses upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes, unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial."

The case of *Hurtado v. The People of California*, 110 U. S., 516, was a writ of error to the supreme court of that state, by a party who had been convicted of the crime of murder in the state court upon an information instead of an indictment. The writ of error from this court was founded on the proposition that the provision of the fourteenth amendment to the constitution of the United States, that no state shall "deprive any person of life, liberty or property without due process of law," required an indictment as necessary to due process of law. This court held otherwise, and that it was within the power of the states to provide punishment of all manner of crimes without indictment by a grand jury. The nature and

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value of a grand jury, both in this country and in the English system of law, were much discussed in that case, with references to Coke, Magna Charta, and to other sources of information on that subject, both in the opinion of the court and in an exhaustive review of that question by Mr. Justice Harlan in a dissenting opinion.

It has been said that, since there is no danger to the citizen from the oppressions of a monarch, or of any form of executive power, there is no longer need of a grand jury. But, whatever force may be given to this argument, it remains true that the grand jury is as valuable as ever in securing, in the language of Chief Justice Shaw in the case of *Jones v. Robbins*, 8 Gray, 329, "individual citizens from any open and public accusation of crime, and from the trouble, expense and anxiety of a public trial before a probable cause is established by the presentment and indictment of a grand jury;" and "in case of high offenses" it "is justly regarded as one of the securities to the innocent against hasty, malicious and oppressive public prosecutions."

It is never to be forgotten that, in the construction of the language of the constitution here relied on, as indeed in all other instances where construction becomes necessary, we are to place ourselves as nearly as possible in the condition of the men who framed that instrument. Undoubtedly the framers of this article had for a long time been absorbed in considering the arbitrary encroachments of the crown on the liberty of the subject, and were imbued with the common law estimate of the value of the grand jury as part of its system of criminal jurisprudence. They, therefore, must be understood to have used the language which they did in declaring that no person should be called to answer for any capital or otherwise infamous crime, except upon an indictment or presentment of a grand jury, in the full sense of its necessity and of its value. We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged. The sentence of the court was that he should be imprisoned in the penitentiary at Albany. The case of *Ex parte Wilson*, 114 U. S., 417 (S. C., 4 Am. Cr. R., 283), and the later one of *Mackin v. United States*, 117 U. S., 348, establish the proposi-

tion that this prosecution was for an infamous crime within the meaning of the constitutional provision.

It only remains to consider whether this change in the indictment deprived the court of the power of proceeding to try the petitioner and sentence him to the imprisonment provided for in the statute. We have no difficulty in holding that the indictment on which he was tried was no indictment of a grand jury. The decisions which we have already referred to, as well as sound principle, require us to hold that after the indictment was changed it was no longer the indictment of the grand jury who presented it. Any other doctrine would place the rights of the citizen, which were intended to be protected by the constitutional provision, at the mercy or control of the court or prosecuting attorney; for, if it be once held that changes can be made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists. It is of no avail, under such circumstances, to say that the court still has jurisdiction of the person and of the crime; for, though it has possession of the person, and would have jurisdiction of the crime if it were properly presented by indictment, the jurisdiction of the offense is gone, and the court has no right to proceed any further in the progress of the case for want of an indictment. If there is nothing before the court which the prisoner, in the language of the constitution, can be "held to answer," he is then entitled to be discharged, so far as the offense originally presented to the court by the indictment is concerned. The power of the court to proceed to try the prisoner is as much arrested as if the indictment had been dismissed or a *nolle prosequi* had been entered. There was nothing before the court on which it could hear evidence or pronounce sentence. The case comes within the principles laid down by this court in *Ex parte Lange*, 18 Wall., 163; *Ex parte Parks*, 93 U. S., 18; *Ex parte Wilson*, 114 U. S., 417 (S. C., 4 Am. Cr. R., 283), and other cases.

These views dispense with the necessity of examining into the questions argued before us concerning the formation of the

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grand jury and its removal from place to place within the district. We are of opinion that the petitioner is entitled to the writ of *habeas corpus*, and it is accordingly granted.

NOTE.—*Habeas corpus*.—See *Lowery v. Howard*, 5 Am. Cr. R., 273 and note, as to when and under what circumstances a party may be restored to liberty by virtue of this writ.

KELLEY v. THE PEOPLE.

(115 Ill., 583.)

CONSTITUTIONAL LAW: *Habitual criminal's act — Erroneous conviction of prior offense not material.*

1. HABITUAL CRIMINAL'S ACT CONSTITUTIONAL.—The act of 1883, providing increased penalties for second and subsequent offenses of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, is not unconstitutional, either as visiting penalties disproportioned to the offenses under constitution of 1870 (art. 2, § 11), or as placing the defendant in jeopardy a second time for the same offense.
2. FOR WHAT OFFENSES THE SUBSEQUENT CONVICTIONS MUST BE HAD.—Section 1 of the act above cited does not require that the second offense dealt with therein shall be a second conviction of the identical crime for which the offender was first convicted; but provides that, whenever any person having been convicted of either of several enumerated crimes shall thereafter be convicted of *any one of such crimes* he shall be liable to such increased penalty. Therefore, a conviction of burglary, accompanied by proof of a former conviction of robbery, constitutes a case of second offense.
3. ERROR IN FORMER CONVICTION IMMATERIAL.—The fact that the former conviction, which is proved in order to constitute a second offense, was erroneous, will not prevent the operation of the statute, if such error did not deprive the court of jurisdiction.

Writ of error to the Criminal Court of Cook County, the Hon. Geo. Gardner, judge, presiding.

J. M. Longenecker, for the plaintiff in error.

J. S. Grinnell, prosecuting attorney, and *Geo. Hunt*, attorney-general, for the people.

SHELDON, J. Joseph Kelley, at the January term, 1884, was tried by a jury in the criminal court of Cook county for burglary, the indictment containing a count setting forth a former

conviction, at the July term, 1882, of said Kelley for robbery. He was found guilty of burglary, and the jury, under instruction of the court, fixed his punishment at fourteen years' imprisonment in the penitentiary. The court sentenced him accordingly.

Several questions are raised with respect to the act respecting conviction upon second and third offenses, approved June 23, 1883. Laws 1883, p. 76. That act in its first section is as follows:

"That whenever any person, having been convicted of either of the crimes of burglary, grand larceny, horse-stealing, robbery, forgery, or counterfeiting, shall thereafter be convicted of any one of such crimes committed after such first conviction, the punishment shall be imprisonment in the penitentiary for the full term provided by law for such crime at the time of such last conviction therefor; and, whenever any such person having been so convicted the second time, as above provided, shall be again convicted of any of said crimes, committed after said second conviction, the punishment shall be imprisonment in the penitentiary for a period not less than fifteen years: *Provided*, that such former conviction or convictions and judgment or judgments shall be set forth in apt words in the indictment."

It is objected that the act is unconstitutional in that it violates the provision that "all penalties shall be proportioned to the nature of the offense." Sec. 11, art. 2, Const. 1870. It is said the punishment provided for by the act is not in proportion to the nature of the offense, but is because of a former conviction, for which the person charged has paid the penalty. Similar statutes have been adopted in many of the states, and they are upon the principle that it is just that an old offender should be punished more severely for a second offense; that repetition of the offense aggravates guilt. 1 Bish. on Crim. Law, 959; 1 Whart. on Crim. Law, § 13. It would be entirely competent for the legislature, in the absence of this act, to affix, as a punishment for the first commission of any one of the crimes named, the highest punishment that is authorized by the act, and it would not be for the court to say the penalty was not proportioned to the nature of the offense.

It is urged that under this act it is putting the accused in

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It is next must be found do not so whenever several convictions of such conviction one for which of the crime mer conviction for robbery not guilty tried by the court in this is to say, for one year

It is insisted that the conviction trial by jury a finding Conceding ing of guilt low that not to be distinction is undoubted subject-matter be void, proceeding question

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jeopardy twice for the same offense in violation of section 10, article 2, of the constitution. There is no trial twice for the same offense, but twice for two crimes committed at different times. The constitutional objections are without force.

It is next insisted that, under this act, the second conviction must be for the same crime the former conviction was for. We do not so read the statute. The language is most plain: that, whenever any person, having been convicted of either of the several enumerated crimes, shall thereafter be convicted of *any one of such crimes*, etc. It seems quite clear that the second conviction is not to be of a *particular* one of the crimes,—the one for which the former conviction was had,—but of *any* one of the crimes named. The record introduced to show a former conviction for robbery shows that the accused was indicted for robbery at the July term of court, 1882, and that he pleaded not guilty; that he waived the intervention of a jury, and was tried by the court without a jury, and found guilty by the court in manner and form as charged in the indictment,—that is to say, of robbery,—and was sentenced to the penitentiary for one year.

It is insisted this did not show a legal conviction of robbery; that the accused in a criminal case of felony cannot waive a trial by jury and be tried, by consent, by the court, and upon a finding of guilty on such a trial be legally sentenced thereon. Conceding this to be so, and that a judgment upon such a finding of guilty would be irregular and erroneous, it does not follow that such conviction was void,—an absolute nullity,—and not to be taken here as a former conviction. There is a distinction between “void” and “erroneous,” and the general rule is undoubted, that where the court has jurisdiction of the subject-matter and of the person, its judgment in the case will not be void, although it may be erroneous, and that in a collateral proceeding the validity of the judgment cannot be called in question.

In the application of the rule to the precise kind of case which is here presented, what of authority we have met with is not entirely harmonious. Thus in *Windsor v. McVeigh*, 93 U. S., 274, in the opinion by a divided court, by way of illustration of the argument that a judgment may be void notwithstanding general jurisdiction of the subject, in citation of

instances it is said: "So a departure from established modes of procedure will often render the judgment void; thus the sentence of a person charged with felony, upon conviction by the court without the intervention of a jury, would be invalid for any purpose;" no authority being cited. In *Com. v. Dailey*, 12 Cush., 84, in sustaining a verdict of guilty rendered in a case of misdemeanor, where the defendant had consented to a trial by eleven jurors, which was made a ground of exception, it was said: "As it did not affect the jurisdiction of the court, the exception was one that the accused might waive." So in the recent case of *Lowery v. Howard*, 103 Ind., 440, decided by the supreme court (5 Am. Cr. R., 273), where, upon a plea of guilty to an indictment for murder, the court fixed the punishment at imprisonment in the state's prison for life, and so sentenced the prisoner, when, under the law, a jury should have assessed the punishment to suffer the penalty of death, or be imprisoned in the state's prison for life, it was held that the judgment of the court was erroneous, but that it was not void. And in *Ex parte Bond*, 9 S. C., 80, where a prisoner was convicted of an assault with intent to kill, and sentenced to confinement in the penitentiary, when the offense was not punishable by confinement in the penitentiary, it was held that the sentence was not void, but only erroneous. In *Ex parte Watkins*, 3 Pet., 193, Chief Justice Marshall said:

"An imprisonment under a judgment cannot be unlawful unless that judgment be an absolute nullity, and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

In *Windsor v. Mc Veigh*, *supra*, it was said the general doctrine upon this subject is only correct when the court proceeds after acquiring jurisdiction of the cause according to the established modes governing the class to which the case belongs, and does not transcend, in the extent or character of its judgment, the law which is applicable to it. It was further said that the more correct statement of the doctrine was in *Cornett v. Williams*, 20 Wall., 250, that, "the jurisdiction having attached in the case, everything done *within the power of that jurisdiction*, when collaterally questioned, is held conclusive of the rights of the parties unless impeached for fraud." The power to hear and determine a cause is jurisdiction. It is *coram*

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judice whenever a case is presented which brings this power into action. *U. S. v. Arredondo*, 6 Pet., 709; *Bush v. Hanson*, 70 Ill., 482.

In the case here of the former conviction there was unbounded jurisdiction both of the subject-matter and person. The court had power to proceed to hear and determine. The judgment was not such an one as the court had no power under any circumstances, or upon any state of facts, to pronounce in such a case; but it was one within the power of the jurisdiction which had attached. See *People ex rel. Tweed v. Liscomb*, 60 N. Y., 570. If there had been a finding of guilty, and of the punishment by a jury, or if there had been a plea of guilty by the prisoner, in either such case the judgment would have been right. If the judgment be wrong, it is because it was rendered upon the court's finding the guilt and fixing the punishment; so that the correctness of the judgment depended upon the particular state of facts which was presented in the progress of the hearing and determination of a case of which the court had jurisdiction. The error was one in the exercise of jurisdiction, and not from want of jurisdiction.

The only suggestion of ground there can be for holding the judgment void, and not erroneous merely, is that there was a departure from the established mode of procedure. Almost any deviation from law might be regarded a departure from the established mode of procedure. To admit such a ground of holding a judgment void, would, as it seems to us, in a great measure break down and make uncertain the well-established distinction in regard to the validity of judgments when collaterally questioned, between being void for want of jurisdiction, or erroneous merely in the exercise of jurisdiction.

In Cooley's *Const. Lim.* (5th ed.), 504, 505, it is laid down:

"It is a general rule that irregularities in the course of judicial proceedings do not render them void. An irregularity may be defined as the failure to observe that particular course of proceeding which, conformably with the practice of the court, ought to have been observed in the case."

And on page 507:

"In any case, we suppose a failure to award a jury on proper demand would be an irregularity merely, rendering the proceedings liable to reversal, but not making them void."

We are of opinion the former conviction here should be adjudged to be no more than erroneous, and not to be an absolute nullity;—and especially so, under the circumstances of this case, where the defendant accepted the sentence of the court and suffered it to be carried into execution by undergoing the punishment. The court had fixed the minimum punishment for robbery,—one year in the penitentiary,—the maximum being fourteen years. The defendant may have deemed it for his interest to abide by the sentence of the court rather than to have it set aside, and he be exposed to the peril of having a greater punishment affixed by a jury. The judgment having been acquiesced in, and full execution had of it, we do not see how it can be looked upon as a nullity. It must be held to be, for the defendant, an acquittance from the crime. Upon another indictment for the same offense, he might plead the former conviction in bar; and if, in favor of the prisoner, the former conviction would not be held a nullity, neither, as against him, should it be so held.

Perceiving no error in the record, the judgment will be affirmed.

IN RE STAFF. ON HABEAS CORPUS.

(63 Wis., 285.)

CONSTITUTIONAL LAW: *Waiver of trial by jury—Habeas corpus.*

1. WAIVER OF JURY TRIAL — CONSTITUTIONALITY OF LAW. — The provisions in the statute (Laws Wis. 1881, ch. 197, § 8) creating the municipal court for Rock county, that "a jury trial in said court in criminal cases, begun by information, or not originally begun in said court, may be waived by the accused in writing, or by consent in open court, entered on the minutes," is not unconstitutional.
2. Where a party has waived his right to a jury trial under such statute, and has been convicted and sentenced to imprisonment, the legality of his confinement may be tested by *habeas corpus*.

Habeas corpus.

C. M. Scanlan, for petitioner.

The Attorney-General and *H. W. Chynoweth*, assistant attorney-general, for the respondent.

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LYON, J. A writ of *habeas corpus* having been duly issued out of this court, directed to the warden of the state prison, commanding him to produce before this court James Staff, then in his custody, to the end that the legality of his imprisonment might be inquired into, such warden, in obedience to the mandate of the writ, has brought the said Staff before the court and made return to the writ.

The cause for the imprisonment of Staff is undisputed. It appears, both by the petition upon which the writ was allowed and issued and by the return of the warden to the writ, that the prisoner was convicted in the municipal court of Rock county on an information charging him with the crime of larceny from the person of one Chubbuck of a pocket-book and money therein, of the value of \$84.75, and was thereupon sentenced to imprisonment for two years in the state prison. The information and the form of the judgment and commitment are regular, and no question is raised upon either.

The only alleged defect in the proceedings is that when the prisoner was brought up for trial on his plea of not guilty, he expressly waived a jury trial, and such waiver was duly entered in the minutes of the court. Thereupon he was tried by the court without a jury, and by the court found guilty and sentenced. It is now claimed in his behalf that it was not competent for him to waive a jury trial, and hence that his conviction was illegal and void, and the court had no jurisdiction to proceed thereon to judgment and sentence. If the prisoner could not effectually waive a trial by jury, the court had no jurisdiction to try him, and the conclusion seems undeniable that the judgment would, in that event, be entirely void. Hence, upon the petitioner's theory of the case, *habeas corpus* is the proper remedy, notwithstanding it is well settled that mere irregularity in proceedings resulting in the imprisonment, however flagrant, is not sufficient ground to discharge on *habeas corpus*. That may lawfully be done only where the proceedings are void for illegality. *In re Crandall*, 34 Wis., 173; *In re Pierce*, 44 Wis., 411; *Hurd, Hab. Corp.*, 327. Failing the jurisdiction of the court to try and convict the accused without a jury, the court exceeded its jurisdiction as to subject-matter and person, and its judgment and process of commitment, although in proper form, were issued in a case not allowed by law. Such

alleged excess, or want of jurisdiction may be inquired into on *habeas corpus*, and if found to exist is ground for a discharge of the accused. R. S., § 3428, subds. 1, 4.

Was it competent for the prisoner to waive his right to be tried by a jury? His counsel maintains that the judgment of this court in *State v. Lockwood*, 43 Wis., 403, answers this question in the negative. The assistant attorney-general refers us to the statute creating the municipal court for Rock county (chapter 197, Laws 1881), and to the following clause in section 8 thereof, to wit: "A jury trial in said court in criminal cases begun by information, or not originally begun in said court, may be waived by the accused in writing or by consent in open court, entered on the minutes," and maintains that, under this statute, the above question must be answered in the affirmative. If the statute be sustained, the trial of the prisoner was regular, and the conviction cannot be questioned. The precise question to be determined, therefore, is this: Is the provision of the statute above quoted a valid law? It certainly is a valid law, unless it contravenes section 7, article 1, of our constitution, which ordains that "in all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and, in prosecutions by indictment or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed, which county or district shall have been previously ascertained by law."

The cases which hold that in a criminal prosecution the accused cannot effectually waive a jury trial are quite numerous, and, as was said by the late chief justice in *State v. Lockwood*, such is undoubtedly the current of authority. None of those cases, however, involve the consideration of statutes like that under consideration. They were determined upon general principles without regard to statutes, and they disclose a radical difference of opinion by different courts as to the grounds upon which the rule is based.

The constitutional provision above quoted is found in nearly or quite all of the state constitutions, as well as in the amendments to the constitution of the United States. Article 6,

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amendment of 1791. Some courts have held that it prescribes the tribunal in which, and before which, criminal prosecutions must be tried, and that a jury is an essential part of such tribunal, and cannot therefore be dispensed with by consent of the accused or otherwise. A leading case which sustains this view of the provision is that of *Cancemi v. People*, 18 N. Y., 128. In that case the prisoner was, with his consent, tried by eleven jurors and convicted. The judgment was reversed for that reason. Manifestly the same principle is involved where the whole jury is waived, for eleven jurors are not a good common law jury. In the opinion of the court, written by Judge Strong, it is said: "But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people has no authority to consent to such a change, nor has the defendant." This opinion is fortified (or attempted to be) by reference to the *Cases of Lord Dacres and Lord Audley*, in England. Lord Dacres was indicted for treason in 1535, and was tried by his peers, the duke of Norfolk being high steward. All of the judges assembled on the day before the trial to resolve certain questions which might arise upon the trial. One of these questions was whether the prisoner might waive his trial by his peers and be tried by the country, and they all agreed he could not, resting their decision upon the following clause of *Magna Charta*: "No free person shall be taken or imprisoned, or shall be disseised of any free teneiment of his, or his liberties or free customs, nor shall he be outlawed or be punished in any other way; nor will we come upon him, nor send him to prison, *unless by legal decision of his equals*, or by the law of the land." *Magna Charta* by Wells, 65, § 29. When arraigned and asked how he would be tried, the report says the prisoner "took long time to consider, and would not have put himself upon his peers; but at last the high steward told him that he must give judgment against him as a traitor unless he put himself upon his peers, as against one who refused the tryal of law; and thereupon he put himself for his tryal upon his peers." *Case of Lord Dacres*, J. Kelyng's Crown Cas., 89. It may be a relief to know that Lord Dacres was acquitted, and an acquittal in prosecutions for treason was so rare in

those days that this fact is mentioned, in an extract from Hargrave, found in 1 How. St. Tr., 407, as an apology or inducement for mentioning the case.

Lord Audley was tried in 1631 on an indictment for felony. As in the *Case of Lord Dacres*, the judges were summoned before the trial, and the question, among others, was submitted to them, whether a peer of the realm might waive his trial by his peers and plead he will be tried by God and the country. The judges answered: "He might not; for his trial by peers was no privilege, but the law declared by *Magna Charta*, which, if he would not plead to by a trial of his peers, was standing mute." *Case of Lord Audley*, 3 How. St. Tr., 401.

The language of *Magna Charta* is that no free person shall be imprisoned "unless by legal decision of his equals." This is not the conferring of a privilege upon the accused, but prescribes the tribunal by which he shall be tried; hence the judges said that it was no privilege, but the law. See, also, 2 Wooddeson's Lectures, 581 (2d ed., 346). So, also, the constitution of the United States as originally adopted provided that "the trial of all crimes, except in cases of impeachment, shall be by jury." Art. 3, § 2. Under such a provision it would most undoubtedly be held that in the trial of criminal causes other than impeachments a jury could not be dispensed with by consent of the accused, or otherwise. But the provision of our constitution above quoted, as well as that of New York, is entirely different. In terms it grants privileges. Its language is: "The accused shall enjoy the right, . . . in prosecutions by indictment or information, to a speedy public trial by an impartial jury," etc. It seems to us that the courts of New York, and other courts which have adopted the same reasoning, have overlooked this distinction.

It is obvious that if the constitutional provision under consideration was correctly interpreted by the New York court—that is to say if the constitution prescribes the tribunal for the trial of criminal prosecutions, and makes a jury an essential part of it,—it is beyond the power of the legislature to change the tribunal by eliminating the jury therefrom, or by allowing the accused to do so.

It may here be observed that *Cancemi v. The People* was a capital case, the indictment and conviction having been for

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murder, which was and is punishable by death in that state. Many of the cases which hold that the prisoner cannot effectually waive a jury are of the same class. The judgments in those cases may well be sustained, on the principle or rule which has sometimes been asserted, that in capital cases, *in favorem vite*, the prisoner can waive nothing. It may also be remarked that some of the cases seem to make a distinction between felonies and misdemeanors, holding that in a prosecution for a misdemeanor a jury may be dispensed with by consent of the accused. This distinction was ignored in *State v. Lockwood*, 43 Wis., 403; and in respect to misdemeanors, the punishment for which is or may be imprisonment, there seems to be no substantial ground upon which to rest the distinction. If the line can be drawn between different grades of crime, perhaps a plausible reason might be given for holding that misdemeanors punishable by fine only are distinguishable from other crimes. It might be said that a criminal prosecution for such a misdemeanor is, in its results, essentially like a civil action sounding in tort. In either case, judgment against the defendant is for dollars and cents only, and imprisonment may follow non-payment thereof.

Some courts, notably the supreme court of Iowa, in view of the peculiar terms of the constitutional provision under consideration, have held that the rights guaranteed therein are merely privileges granted the accused, which he may waive without the aid of any statute. It was so held in *State v. Kaufman*, 51 Iowa, 578. The opinion is by Judge Seevers, and it would be hard to refute the vigorous logic with which he sustains the conclusion and judgment of the court. It is not necessary, however, for us to go to that extent in this case, and indeed we cannot do so without overruling the case of *State v. Lockwood*, *supra*. That judgment went upon the ground that the right of trial by jury secured by the constitution rested upon public policy, and could not, therefore, be waived by the defendant.

It has already been observed that in *State v. Lockwood*, and in numerous cases elsewhere which hold the same doctrine, no question of the power of the legislature to provide for the waiver of a jury was involved or considered. The question is now raised for the first time in this court. We find no provis-

ion in the constitution which denies to the legislature the power to permit a person charged with crime to waive a jury and be tried by the court. There may be circumstances which would lead the accused to desire such a trial, and it might be greatly to his benefit. Why should he be denied the privilege? In the absence of a statute conferring it, there may be some good reason resting in considerations of public policy (although perhaps not very apparent) why he should not have such privilege. But when the legislature says that he may have it, and thus establishes a different public policy, what constitutional rule is violated? Public policy is to some extent a creation of the legislature. The statutes embody much of the public policy of the state, and that policy may be one thing to-day and the opposite to-morrow, as the legislature in its wisdom may enact. It was the public policy of the state to deny to persons about to be tried for crime the power effectually to waive a jury. It is now its policy to permit such waiver in the municipal court for Rock county, and in some other courts, and perhaps hereafter the same policy may be extended to all trial courts in the state. We cannot perceive wherein such legislation infringes the constitution. We have more difficulty in finding a satisfactory reason for holding that any legislation is required to confer the right to waive a jury. Section 7 of article 1 confers many rights upon a person accused of crime, every one of which he may waive, without authority of statute, as has often been judicially determined, except the right to be tried by a jury. Such waiver may be express, or it may be by failure to make due objection and exception. The accused shall enjoy the right to be heard by himself and counsel; yet he need not have counsel unless he chooses, and need not say a word in his own defense; he may plead guilty, and thus waive every right conferred in the section. He may demand the nature and cause of the accusation against him; yet when arraigned he may waive the reading of the indictment or information. He has the right to meet the witnesses face to face; yet he may lawfully consent to the reading of depositions of absent witnesses in evidence. He is entitled to compulsory process to compel the attendance of his witnesses; yet he may not avail himself of such process. He is entitled to a speedy public trial; yet, with his consent, trial may be delayed for

years, and the trial at or district was committed with his co-trict and trial which the jury, that twelve qualified for alienage by the failure of the jury, 22 V.

It is not meled by list the only and held that may also we cannot But we have policy which by the accused and framed reach of legislative authority authorizing cases in which receive. *Worden v. Lingham* 470; *Brooks v. Carpenter* and interest.

The cases are cited but a be found notes to Elliott, i. "Waiver

years, and no doubt the public at large may be excluded from the trial at his request. He is entitled to a trial in the county or district previously ascertained by law wherein the offense was committed; yet he may have a change of venue, and, with his consent, the cause may be sent to some county or district and tried therein, hundreds of miles distant from that in which the crime was committed. He is entitled to be tried by a jury, that is, a common law jury, which must consist of twelve qualified jurors; yet, if one of the jurors is disqualified for alienage or other cause, in this state the objection is waived by the failure of the accused to challenge such juror. *State v. Vogel*, 22 Wis., 471.

It is not strange that the supreme court of Iowa, untrammelled by previous adverse decisions in that state, added to the list the only remaining right given the accused by section 7, and held that without any statute authorizing it, the accused may also waive the right to be tried by a jury. The reason why we cannot go to the same extent has been already suggested. But we have no difficulty whatever in holding that the public policy which stood in the way of an effectual waiver of a jury by the accused in a criminal case is not so inherent in the form and frame-work of our government as to place it beyond the reach of legislative interference, but that it is the subject of legislative control. In this view we are sustained by ample authority in other states where laws have been enacted authorizing the waiver of juries in criminal cases, and by other cases in states where no such laws have been enacted, but which recognize the power of the legislature to do so. *State v. Worden*, 46 Conn., 349; *Ward v. People*, 30 Mich., 116; *Dillingham v. State*, 5 Ohio St., 280; *State v. Mansfield*, 41 Mo., 470; *Brown v. State*, 16 Ind., 496. In the opinion by Judge Carpenter in *State v. Worden*, *supra*, will be found a very able and interesting discussion of the subject.

The cases which illustrate and affirm the foregoing propositions are very numerous. It has been thought necessary to cite but a few of them. Reference to many of these cases will be found in Cooley, Const. Lim., 391, note 2 (5th ed.); in the notes to section 113, Proff. Jury Tr.; in an article by Judge Elliott, in 6 Crim. Law Mag., 182 (No. 2, March, 1885), on "Waiver of Constitutional Rights in Criminal Cases;" and in

the able brief herein of Mr. Chynoweth, the assistant attorney-general.

Our conclusion is that the act of 1881, under consideration, is a valid law, and hence that the defendant effectually waived his right to a jury trial, and was properly tried by the court. The judgment and sentence are therefore legal and valid, and the prisoner, James Staff, must be remanded to the custody of the warden of the state prison.

By the Court.— It is so ordered.

NOTE.—See *Lowery v. Howard*, 5 Am. Cr. L., 273, and note, as to when and under what circumstances a party may be restored to liberty by virtue of the writ of *habeas corpus*.

MARTIN V. BLATTNER AND ANOTHER.

(68 Ia., 286.)

CONSTITUTIONAL LAW: *Police power—Intoxicating liquors—Nuisance—Owner of premises.*

1. POLICE POWER—PRIVATE PROPERTY.—All citizens of the state hold their property subject to such police regulation as the interest, health and safety of the people may demand, and no right of property can intervene to arrest the enforcement of penalties for the violation of the criminal statutes of the state.¹
2. PROHIBITED ACT—LEASE.—The fact that the prohibited act was lawful prior to the passage of the prohibitory statute does not exempt it; and the fact that the property in which the unlawful act was conducted was leased for that purpose prior to the passage of the prohibitory statute cannot relieve either the offender or the owner of the property from the operation of the statute.
3. NUISANCE—OWNER OF PREMISES.—Keeping a house or place for the purpose of selling intoxicating liquors is a nuisance under the Iowa code (section 1543, as amended by chapter 143 of the acts of the twentieth general assembly) and all engaged in keeping such house, as well as the owner thereof, may be enjoined from keeping and maintaining such nuisance.
4. ACTS OF TWENTIETH GENERAL ASSEMBLY, CHAPTER 143, CONSTITUTIONAL.—Chapter 143 of the acts of the twentieth general assembly is not repugnant to section 29 of article 3 of the constitution, is not in conflict with section 6 of article 1, and is constitutional.
5. RES ADJUDICATA.—An adjudication that defendant was not guilty of an offense punishable upon information filed before a justice of the

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peace cannot be pleaded in bar to an action for maintaining a nuisance.

6. CONSTITUTIONAL LAW — IMPRISONMENT FOR CONTEMPT — SERVITUDE.— Imprisonment for contempt of court is not servitude, and the law providing therefor is not in conflict with article 1, section 23, of the constitution.
7. SAME — FINES NOT EXCESSIVE.—Fines provided for violation of liquor law not excessive and not in conflict with article 1, section 17, of the constitution, nor in conflict with the fourteenth article of amendment to the constitution of the United States.

Appeal from Mahaska Circuit Court.

The plaintiff brought this suit in chancery under Code, section 1543, as amended by chapter 143 of the acts of the twentieth general assembly, to restrain the defendants and another from maintaining a nuisance by keeping a place for the unlawful sale of intoxicating liquors. A preliminary injunction was allowed. Defendants C. Blattner and Gibbs appeal.

John F. Lacy, Bolton & McCoy, J. C. Williams, and Phillips & Greer, for appellants C. Blattner and another.

Gleason & Haskell, for appellee C. Martin.

BECK, C. J. 1. The original petition contains sufficient averments charging that Charles and Fred Blattner maintained a nuisance by keeping a place for the unlawful sale of intoxicating liquors. Fred, by his answer, not under oath, denies the allegations. Charles, in a verified answer, makes a like denial, and pleads that the statute under which the proceeding is instituted is unconstitutional, and that the action is barred by reason of the fact that he was adjudged not guilty in two separate criminal proceedings wherein he was charged with violating the statute prohibiting the sale of intoxicating liquors. In an amended petition it is alleged that Gibbs is the owner of the premises wherein the unlawful sales of intoxicating liquors were made, and that the other defendants are his lessees. Gibbs, in his answer, admits that he owns the premises in question, and alleges that he leased them October 1, 1883, for the term of three years. He does not state to whom the lease was made, nor its terms, nor for what purpose the premises were leased. He alleges that the statute under which the proceedings are had is in conflict with the constitution of the United States, and that the plaintiff has a plain, speedy and

adequate remedy at law. The allegations of the petition were supported by certain affidavits filed by plaintiff. Upon the pleadings and proof the circuit court ordered that an injunction issue restraining all of the defendants "from keeping and maintaining a nuisance, and from selling intoxicating liquors, or keeping the same for sale, and from permitting the same to be kept or sold or drank in or on" the premises in question, properly describing them. Charles Blattner and Gibbs appeal and present various objections to the decision of the circuit court, which we will proceed to consider.

2. It is insisted that as it is alleged in the answer of Charles Blattner, and shown by the affidavits of himself and Fred, that he had no interest in the saloon, and was not concerned in keeping it, the injunction should not have been allowed as against him. We think the proof sufficiently shows that he was concerned in the saloon. It is not denied that he had been at one time interested in and an owner of the saloon, and it is not shown that he had parted with his interest in it. The proof shows that he was regarded as the owner by those who patronized the saloon, and that he was, by at least one witness, seen there exercising the authority of an owner, and claiming certain property found there. The circuit court had ample ground to hold that he was concerned in the violation of the law by the sale of intoxicating liquors at the place described in the petition.

3. It is next insisted that Gibbs, being the lessor of the premises in which the law was violated, cannot be reached by an injunction. We think the consideration of some familiar principles of the law and provisions of the statute will establish the contrary conclusion. Under the statute real estate used with the knowledge or consent of the owners for unlawful traffic in intoxicating liquors is subject to a lien for all judgments rendered for fines and penalties provided for the violation of the law by such traffic. Code, § 1558. And the building, without regard to its ownership, in which such traffic is carried on is declared to be a nuisance. Code, § 1543. It is a well-settled rule of the law that all property of the citizen is held subject to such police and other regulations as the legislature may provide for the protection of the health and safety of the people, and that no right of property can inter-

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vene to arrest the enforcement of penalties for the violation of the criminal statutes of the state. The welfare of the people in their health, property and lives is above the rights of the individual citizen. When the state, in the exercise of its sovereign authority, declares that an act is unlawful, no citizen may disobey such a statute for the reason that the act was before the legislation lawful, and that he held property exclusively used in the commission of the act. A contrary rule would arrest progress by legislation in efforts to suppress vice and crime. The owner of property cannot by leasing it remove it from the operation of these principles. His lease, being in conflict with the law, is void; he cannot plead it as an instrument which sanctifies crime and the violation of law. By the violation of the law the lease ceases to be of force, and it becomes the duty of the lessor to exercise the right which he possesses to oust the lessee from the possession of the premises unless he ceases to violate the law. Without special reference to the numerous authorities supporting these views, it is sufficient to refer to the following of that class: *Cooley*, Const. Lim., 583; *People v. Hawley*, 3 Mich., 330; *Reynolds v. Geary*, 26 Conn., 179; *Brick Presbyterian Church v. Mayor, etc.*, 5 Cow., 538.

The defendant Gibbs having leased the property to the vendor of liquors, forbidden by the statute, and refusing to exercise his right and authority to forbid the traffic, and to oust the violator of the law from his land, becomes an aider and abettor of the violator of the law. And his abetting of the crime becomes active when he comes into a court of justice and contends with the other violators of the law for its defeat, and the criminals escape from the penalties and remedies provided for suppressing the crimes in which they are engaged. We are of the opinion that he is a proper party to the action, and the court rightly restrained him from permitting the unlawful traffic which he was doing by failing to declare his lease void and to oust the vendor of intoxicating liquors from the possession of the property.

4. Counsel for defendant insist that the statute under which this suit is prosecuted is in conflict with the constitution upon several grounds. The first, as we understand them, is that the statute deprives the defendants of a trial by jury. This objec-

tion was fully considered in *Littleton v. Fritz*, 65 Iowa, 488, after careful and thorough argument, and it was again recently argued upon a petition for rehearing. We have an abiding confidence in the correctness of our decision in that case, and deem it useless to repeat the satisfactory arguments upon which it is supported.

5. Counsel contend that the act of the twentieth general assembly (chapter 143) is repugnant to section 29 of article 3 of the constitution, which provides that every statute shall embrace but one subject, and matters properly connected therewith, which shall be expressed in its title. This act is amendatory of prior legislation intended for the suppression of the traffic in intoxicating liquors. The act provides for additional penalties and remedies against the violators of the statute. The subject of the statute is the prohibition of the sale of intoxicating liquors. Remedies by injunction and additional or enlarged penalties are matters connected with this subject. We think all the provisions found in the act are within the purview of the subject, or are matters connected therewith. The point demands no further attention.

6. It is next argued that the statute is in conflict with section 6 of article 1, which declares that "all laws of a general nature shall have a uniform operation." It is insisted that the provision of the statute prescribing the remedy by injunction, and the punishment of those committing contempts by disobedience thereto, is special, and does not have a general operation. This provision pertains to the sanction of the statute, and the remedy for its violation by the commission of crime forbidden by it. All statutes punishing criminally the violation of the law, or providing for the prevention of crimes, are special in their characters, just as this statute is, and they could not be otherwise.

It would be absurd to claim that all felonies should be punished to the same extent, or in the same manner, or that even degrees of the same offense should have affixed to them by the statute the same punishment. And it would not for a moment be claimed that the same proceedings and remedies should be provided for all violations of the law; that homicides, larceny, vagrancy, breaches of the peace and the prevention of crimes should all be subject to the same proceedings,

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and that no special provisions should exist in one case unless made applicable to all. To the law-making department of the government is confided the duty of providing enactments for the punishment and prevention of crimes. In the exercise of the wisdom gained by experience in the administration of the law in a land of constitutional liberty, the general assembly discovered that the provision in question is required in order to enforce the statute it enacted. The same legislative wisdom discovered no necessity for the provision to be made applicable to other nuisances, or to other offenses. The remedy and penalties prescribed in the statute were therefore limited to nuisances committed by the sale of intoxicating liquors, and they were extended to no other class of offenses. The statute is in no sense within the constitutional provision just quoted.

7. The defendant Charles Blattner was tried before a justice of the peace for an offense in violating the provisions of the statute prohibiting the sale of intoxicating liquors, and was acquitted. He now insists that the judgment in that case is a bar to this proceeding. An adjudication that defendant was not guilty of an offense punishable upon information filed before a justice of the peace cannot be an adjudication that he was not maintaining a nuisance. That was a proceeding to inflict punishment for an offense. This is an action in chancery to restrain acts which the statute declares are a nuisance. The proceedings in these cases are unlike, their purposes are not the same, and the judgments entered in them are not alike. A judgment in one action will not bar the other. To claim otherwise is as unreasonable as to insist that a judgment in an action of forcible entry and detainer would bar an action of ejectment for the same lands, or that an acquittal on a charge for assault and battery would bar a proceeding to require the accused to enter into bonds to keep the peace.

8. It is next insisted that the statute, in providing a penalty for disobedience of an injunction, is in conflict with article 1, section 23, of the constitution, which provides that there shall be no involuntary servitude except for the punishment of crime. It is impossible to discover reasons for holding that an imprisonment for a contempt is a *servitude*. If counsel's position be correct, all commitments for contempt are forbidden by the

constitution. We think counsel are not prepared to go that far; we certainly are not.

9. It is next said that the fines provided for in the statute are excessive, and it is therefore in conflict with section 17 of article 1 of the constitution. We do not concur in the position. We think that there is no ground for holding that the statute in this regard conflicts with the constitution.

10. Counsel urge that the statute is in conflict with the fourteenth amendment to the constitution of the United States, for the reason that it abridges the privilege of the citizens of the United States. It has been held in numerous cases decided by this court and by the courts of other states, that statutes prohibiting the traffic in intoxicating liquors are within the police authority of the state. All privileges of citizens of the United States are held subject to this power. This amendment was not intended to limit this power of the states. This conclusion is not only supported by principle, but also by the familiar political history of the constitutional amendment in question.

The foregoing discussion disposes of all questions considered by counsel. The decision of the circuit court is affirmed.

ON REHEARING.

SEEVERS, J. It must be assumed that Mr. Gibbs leased the premises for a lawful purpose, and that he did not have any knowledge, at the time the injunction was asked, that his tenants had committed a statutory nuisance thereon by selling intoxicating liquors contrary to law. This being so, a petition for a rehearing has been filed upon the ground that a landlord cannot be made liable for a nuisance created by his tenant of which he has no knowledge. Authorities are cited in support of this doctrine, and we think, in a certain sense, it is undoubtedly true. Cooley, Torts, 608-612; Wood's Landl. & Ten., § 539. An examination of these authorities, and all others cited in notes therein, will demonstrate that the doctrine above stated has been established in actions to recover damages for the erection or continuance of private nuisances. In such cases it has been generally held that a landlord is not liable in damages that have been caused by nuisances created by his tenant, of which the landlord has no knowledge. This case is materi-

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ally different. In the first place, this is a public nuisance, although the action is brought by a private citizen under a statute which authorizes him to bring this action. In the second place, it is not sought to recover damages for the past, but the sole object of the action is to restrain and prevent the nuisance in the future. When Mr. Gibbs was made a party to the action, he obtained knowledge that it was claimed and charged that his tenants had been using the leased premises as a place for the sale of intoxicating liquors, thereby creating a public nuisance, and therefore he, as the owner of the premises, or, rather, his property, under the statute, would become liable as therein provided. This, at least, should be regarded as sufficient to put him on inquiry as to the truth of the matter charged. Not only so, but, as he was made a party and appeared in the action, he is chargeable with such knowledge, in relation to the existence of the nuisance, as was established by the evidence introduced on the trial. The court found and determined that a nuisance existed, and until this determination was reversed or set aside in a lawful manner, it must be regarded as conclusive evidence of the existence of the nuisance as against not only the lessees, but also as to the landlord.

The statute provides that the "building or erection, of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, . . . any intoxicating liquor, is carried on, . . . is hereby declared a nuisance, and shall be abated as hereinafter provided. . . . Any citizen of the county where such nuisance exists . . . may maintain an action in equity to abate and perpetually enjoin the same." Chapter 143 of the Acts of the Twentieth General Assembly; Miller's Code, 411. Under this statute it seems to us that the building becomes a nuisance, and that its continuance as such may be enjoined and prevented. Such is, as we understand, the plain import of the statute.

As we have seen, Mr. Gibbs obtained knowledge at the trial that his building was, under the statute, a public nuisance, and that a citizen acting for the public asked that it be enjoined. It seems to us clear that such a remedy existed as against him and his building. The statute in express terms so provides, and the court was bound to grant the relief asked. We affirm the proposition to be true upon principle, that no one can use

his property or permit it to be used by another so as to create a public nuisance. The right of the public in this respect is superior to that of the individual. The property of the latter must be held in subordination to the rights of the general public. The health and morals of the community so require. The existence of the nuisance having been conclusively established as between the parties to this action, and between each of them, by the judgment of the court, it necessarily follows that the tenants cannot continue the business, or do the thing which created it, in the leased premises. The premises may continue to be occupied by them for lawful purposes, and the lease may continue to exist. Clearly, however, in our judgment, Mr. Gibbs can protect himself and his premises from being a public nuisance; and to that end he may have the power to cancel the lease or enjoin the unlawful use. We, however, do not regard it as essential to determine this question. The petition for a rehearing is overruled.

NOTE.—In nearly every state in the American Union, even in those states lately in rebellion against the government of the United States, it is decided that the fourteenth amendment to the constitution of the United States is a limitation upon the power of the states. The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, . . . nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation." But, notwithstanding this constitutional guaranty of personal rights and of private property, the state might deprive its own citizen, or any person within its jurisdiction, of life, liberty or property in any mode or by any form of law enacted by its legislature and sanctioned by its courts, and, however tyrannical, cruel and unusual the punishment, or unjust the decree which deprived him of his life or liberty or despoiled him of his property, he was without the protection of the federal constitution.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," is the language of the first article of the constitution, and broad and beneficent as this language may seem, if Utah were a member of the sisterhood of states, his polygamic majesty by edict from his temple or by rescript of his legislature might compel every citizen within the jurisdictional limits of the state to bow in reverence before the shrine of Mormonism and lay yearly tithe at the foot of a Mormon altar. Can any man who fought to uphold the Union and sustain the supremacy of the nation be convinced that all the lives which were sacrificed and all the treasure which was expended to establish a principle and

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The federal judiciary, the pulse of whose judgment does not beat time to local prejudices, is steadily and surely moving in the direction of extending the protection of the federal constitution to the citizen who is deprived of his personal or property rights under obnoxious state laws.

Though a law or an ordinance be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution. *Yick Wo v. Hopkins*, 118 U. S., 356; *Henderson v. Mayor of N. Y.*, 92 U. S., 259; *Chy Lung v. Freeman*, 92 U. S., 275; *Ex parte Virginia*, 100 U. S., 339; *Neal v. Delaware*, 103 U. S., 370.

"The fourteenth amendment, in declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all, under like circumstances, in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to pursuits of any one, except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses." *Barbier v. Connolly*, 113 U. S., 31; *Hayes v. State of Missouri*, 120 U. S., 68.

In *In re Ah Jow*, 20 Fed. Rep., 181, there was a petition for a writ of *habeas corpus* to be released from custody in pursuance of a judgment upon a conviction upon a complaint charging petitioner with a public offense, to wit: "Visiting a room kept in the city of Modesto by another, where opium was sold." The offense for which the petitioner was convicted, and committed as a punishment, is created by section 2 of ordinance No. 4 of the city of Modesto, which reads as follows:

"Sec. 2. Every person, who, in the city of Modesto, opens, keeps, or maintains any room or other place where opium or any of its preparations is sold or given away, and every person who resorts to, frequents, or visits, such room or place, is guilty of a misdemeanor; provided, that this section shall not apply to the sale or gift of any of the preparations of opium by any druggist, for any ailment not caused by the use of opium, or any of its preparations."

Sawyer, J., declaring the ordinance void, says: "Under this section, it would not be lawful for any person, whether Caucasian citizen or other in-

habitant, to enter such a place or drug store for many of the ordinary and proper purposes of life: as to purchase other goods, to collect bills, or transact any legitimate business. To lawfully prohibit, under penalties, the citizens or inhabitants from entering such a place, innocently, not knowing its character, or for any lawful purpose, and without reference to its object, is, in my judgment, entirely beyond the power of the city of Molesta. It is to prohibit an act which is innocent in itself, and lawful under the general laws of the land, and therefore inconsistent with the laws of the land. It is to put an unlawful inhibition upon the inalienable rights and liberties of the citizen; and to commit him to prison for doing so is to restrain him of his liberty without due process of law, in violation of the fourteenth amendment to the national constitution." *Yick Wo v. Hopkins*, 118 U. S., 336.

Police power.—Courts are not warranted in upholding objectionable and unconstitutional enactments under the guise of police regulations. There is no correct principle known to the law upon which to base the claim which some courts maintain, that a void law—that is, an unconstitutional law—may be upheld if it can be brought within the police power of the state. The notions which some courts entertain regarding the scope and purpose of the police power of the state are at war with the plainest principles of constitutional liberty and constitutional protection. It was well and forcibly said by one of America's greatest jurists, Mr. Justice Story, in *Wilkinson v. Leland*, 2 Pet., 657, that "the fundamental maxims of a free government seem to require that the rights of personal liberty and private property should be held sacred. At least no court of justice in this country would be warranted in assuming that the power to violate and disregard them—a power so repugnant to the common principles of justice and civil liberty—lurked under any general grant of legislative authority, or ought to be implied from any general expressions of the will of the people. The people ought not to be presumed to part with rights so vital to their security and well-being, without very strong and direct expressions of such an intention." And in *Baker v. The People*, 3 Cowen, 686, Chancellor Sanford says: "The power of the legislature in the punishment of crimes is not a special grant, or a limited authority to do any particular thing, or to act in any particular manner. A law which should declare it a crime to exercise any fundamental right of the constitution, as the right of suffrage or the free exercise of religious worship, would infringe an express rule of the system, and would, therefore, not be within the general power over crimes; . . . a law enacting that a criminal should, as a punishment for his offense, forfeit the right of trial by jury, would contravene the constitution, and a deprivation of this right could not be allowed in the form of a punishment. Any other right, thus secured as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. These rights are secured to all, to criminals as well as to others, and a punishment consisting solely in the deprivation of such a right would be an evident infringement of the constitution; and all punishments which do not subvert such rules and rights of the constitution are within the scope and choice of the legislative power."

The police power of a state is a power which is to be exercised within the law and by the law through the legitimate channels and functions of the

law. Anything exercise of a la states were fou which springs i ipal laws and is the same law and fro on the ene, but which law of self-pres is the same law from him the p many others w upon police pow of self-preserva tutional restrai this supreme la control, and, th his property in not be justified

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law. Anything beyond this is *not* an exercise of the police power. It is the exercise of a law that existed before constitutions were formulated, before states were founded, before municipal codes were enacted. It is a law which springs into being to meet the necessity of the case wherein municipal laws and constitutional provisions are inadequate and inapplicable. It is the same law which governs the two shipwrecked mariners tossed to and fro on the angry waves, clinging to a single plank which may bear up one, but which is insufficient to bear up both of them, and acting upon the law of self-preservation the one thrusts the other from it to save himself. It is the same law which justifies a man in capturing the thief and wresting from him the property feloniously taken. The exercise of these rights and many others which might be named are not governed by nor dependent upon police powers. They are founded upon the supreme law of necessity, of self-preservation, of natural inherent right — a law which is beyond constitutional restraint and above legal control. Every right not founded upon this supreme law of necessity is subject to constitutional restraint, to legal control, and, therefore, to deprive a man of his liberty or to despoil him of his property in a manner not authorized by the constitution is not, and cannot be justified by calling it, a police regulation.

Property rights — Not invaded under the guise of police laws. — In 1884 the legislature of the state of New York passed a law entitled "An act to improve the public health by prohibiting the manufacture of cigars and preparation of tobacco in any form in tenement houses, in certain cases, and regulating the use of tenement houses in certain cases." The material portions of said act are as follows:

"Section 1. The manufacture of cigars or preparation of tobacco in any form on any floor, or in any part of any floor, in any tenement house, is hereby prohibited, if such floor or any part of such floor is by any person occupied as a home or residence for the purpose of living, sleeping, cooking or doing any household work therein.

"Sec. 2. Any house, building or portion thereof occupied as the home or residence of more than three families living independently of one another, and doing their cooking upon the premises, is a tenement house within the meaning of this act.

"Sec. 3. The first floor of said tenement house on which there is a store for the sale of cigars and tobacco shall be exempt from the prohibition provided in section 1 of this act."

Section 5 provides a penalty by fine or imprisonment for its violation, and section 6 makes the act apply only to cities having over five hundred thousand inhabitants.

One Peter Jacob was arrested for a violation of the act, and at the time of his arrest he lived with his wife and two children in a tenement house in the city of New York in which three other families also lived. There were four floors in the house, and seven rooms on each floor, and each floor was occupied, one family living independently of the others and doing their cooking in one of the rooms so occupied. At the time of his arrest he was engaged in one of his rooms in preparing tobacco and making cigars, but there was no smell of tobacco in any part of the house except the room in which he was thus engaged. After his arrest and commitment for trial by a police justice he sued out a writ of *habeas corpus* before a justice of

the supreme court, and upon the hearing before such justice the writ was dismissed and the petitioner remanded for trial.

From that order he appealed to the general term of the supreme court, which reversed the order and discharged him from prison, on the ground that the act under which he was arrested was unconstitutional and therefore void. The district attorney, on behalf of the people, then appealed to the court of appeals, where the judgment of the supreme court was affirmed, all the judges concurring.

After discussing the property rights involved and showing that the act was void, inasmuch as it deprived the petitioner of his property, answering the contention that the passage of the law was to promote the health, comfort and safety of the people, and therefore a proper exercise of the police power, Earl, J., says:

"Under it the conduct of an individual and the use of property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency engendering overruling necessity, property may be taken or destroyed without compensation, and without what is commonly called due process of law. The limit of the power cannot be accurately defined, and the courts have not been able or willing definitely to circumscribe it. But the power, however broad and extensive, is not above the constitution. When it speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, and so far as it imposes restraints, the police power must be exercised in subordination thereto. Judge Cooley, speaking of the regulation by the legislature under the police power of the conduct of corporations holding inviolable charters, says: 'The limit to the exercise of the police power in these cases must be this: The regulations must have reference to the comfort, safety and welfare of society; they must not be in conflict with any of the provisions of the charter, and they must not, under pretense of regulation, take from the corporation any of the essential rights and privileges which the charter confers. In short, they must be police regulations in fact, and not amendments of the charter in curtailment of the corporate franchise.' Const. Lim. (4th ed.), 719. In Potter's *Dwarris on Statutes*, 458, it is said that 'the limit to the exercise of the police power can only be this: The legislation must have reference to the comfort, the safety or the welfare of society; it must not be in conflict with the provisions of the constitution.' In *Commonwealth v. Alger*, 7 Cush., 53, 84, Shaw, Ch. J., says that the police power 'was vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth and of the subjects of the same. It is much easier to perceive and realize the existence and sources of the power than to mark its limitations or prescribe limits to its exercise.' In *Austin v. Murray*, 16 Pick., 121, 126, it is said: 'The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such is not the object and purpose of the regulation.' In *Watertown v. Mugo*, 109 Mass., 315, 319, Colt, J., says: 'The law will not allow rights of property to be invaded under the guise of a police

regulation for nuisance; and of the regulation. In the *Slaughter* of restrictions these are not principles, but. But under the be permitted to the constitution 47 Barb., 64, upon the police ture can consti which palpably and cannot be mon law defin that the legis commission or or vinegar to l sour, or for an that any citize and without a rivation.' See

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regulation for the preservation of health or protection against a threatened nuisance; and when it appears that such is not the real object and purpose of the regulation, courts will interfere to protect the rights of the citizen.' In the *Slaughter House Cases*, 10 Wall., 36, 87, Field, J., says: 'All sorts of restrictions and burdens are imposed under the police power, and when these are not in conflict with any constitutional prohibitions or fundamental principles, they cannot be successfully assailed in a judicial tribunal. . . . But under the pretense of prescribing a police regulation the state cannot be permitted to encroach upon any of the just rights of the citizen which the constitution intended to secure against abridgment.' In *Coe v. Schultz*, 47 Barb., 64, a learned judge, speaking of the constitutional limitations upon the police power, says: 'I am not willing to concede that the legislature can constitutionally declare an act or thing to be a common nuisance, which palpably, according to our present experience or information, is not and cannot be under any circumstances a common nuisance, by the common law definitions or common law decisions. I am not willing to conclude that the legislature can constitutionally declare or authorize any sanitary commission or board to declare the keeping or the use, in any way, of sugar or vinegar to be a common nuisance, because the one is sweet and the other sour, or for any other reason. By such an unlimited power it is easy to see that any citizen might be deprived of his property without compensation and without any colorable pretext that the public good required such deprivation.' See, also, *In the Matter of Cheesebrough*, 78 N. Y., 232.

"These citations are sufficient to show that the police power is not without limitations, and that in its exercise the legislature must respect the great fundamental rights guarantied by the constitution. If this were otherwise, the power of the legislature would be practically without limitation. In the assumed exercise of the police power in the interest of the health, the welfare or the safety of the public, every right of the citizen might be invaded and every constitutional barrier swept away." *In re Jacobs*, 98 N. Y., 98. To the same effect, see *Millett v. The People*, 117 Ill. 294; *Com. v. Canal Co.*, 66 Pa. St., 50; *Railroad Co. v. Jacksonville*, 67 Ill., 40; *King v. Davenport*, 98 Ill., 314; *People v. Railroad Co.*, 9 Mich., 307; *Watertown v. Mayo*, 109 Mass., 315.

Saloons in Iowa were established, fostered and maintained for a great number of years under legal sanction. Their owners acquired vested rights in this species of property, which they built up and acquired by their capital and industry, at a time when it was lawful for them to do so. The owner's rights in saloon property which the law permits, sanctions and fosters, is just as sacred as the owner's rights in mill, factory or hotel property. If a majority of the people of a state through its legislature may declare that a certain kind of property or business, long sanctioned and fostered by the law, must be confiscated to the state in deference "to the rights of the general public," or because "the health and morals of the community so require," without making compensation to the owner, why should moderate men of sane mind and sound judgment look with horror on the confiscation scheme advocated by Henry George and his followers? If the highest court of each state is merely to record in a perfunctory way the voice of the majority, and to hold those statutes "constitutional which suit us" and

those "void which do not," how many years will it be until a majority of the people of New York, through its legislature, shall declare that "private property in land must and shall be abolished;" and until the court of appeals of that state will say in passing upon and upholding the law, "the right of the public in this respect is superior to that of the individual?" Henry George, recently a candidate for mayor of the city of New York, received about sixty-five thousand votes, and if measured by the rules of natural justice, why should not his theory advance, grow and become popular as compared with the policy of a state that ignores all constitutional guaranties which come into conflict with the opinion of the majority? It certainly has the superior merit, for, under the Georgian theory, the individual who is despoiled of his property for the general good is assured that he will participate, as one of the public, in a general distribution of the property. But under the Iowa confiscation acts, the individual is robbed of everything without the hope of ever receiving anything in return. This is unfair and unjust in the extreme. If the state of Iowa has seen fit to change its policy by declaring that to be a crime, which, for a long series of years, it sanctioned and fostered, it ought to have made compensation to the owners of saloon property for the value of their property. When the law did not make such compensation, it was the imperative duty of the supreme court of that state to place its seal of condemnation upon it. It were vain for courts to attempt to justify decisions upholding confiscation acts of such a nature on the ground that "the right of the public in this respect is superior to that of the individual." The right of the public is superior to that of the individual, but to this extent only—that the state may confiscate the property or destroy the business of the individual when necessary to preserve the health or morals of the community, or for other good and controlling cause, upon making compensation to the owner who purchased that property or built up that business under the sanction of the law. This principle of law, so consistent with the law of natural justice, is older than Magna Charta, is recognized both by the civil and common law in Continental Europe and in England, and is found in the bill of rights in the United States constitution, and in the state constitution of almost every state in the Union.

Sir William Blackstone, in his classification of absolute or fundamental rights, says:

"The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment and disposal of all his acquisitions, without any control or diminution, save only by the laws of the land. . . . The laws of England are therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the great charter has declared that no free man shall be disseized or divested of his freehold, or of his liberties or free customs, but by the judgment of his peers or the law of the land. . . . So great, moreover, is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . In vain may it be urged that the good of the individual ought to yield to that of the community; for it would be dangerous to allow any private man, or even any public tribunal, to be the judge of this common good, and to decide whether it would be expedient or not. Besides, the public is in nothing more essentially interested than in the protection of

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every individual's private rights, as modeled by the municipal law. In this and similar cases the legislature alone can, and indeed frequently does, interpose, and compel the individual to acquiesce. But how does it interpose and compel? Not by absolutely stripping the subject of his property in an arbitrary manner; but by giving him a full indemnification and equivalent for the injury thereby sustained."

So that, according to Blackstone, the right of private property in England, under a government founded upon the feudal principle, is more secure to the subject than it is to the citizen of Iowa, under a republican form of government.

PEOPLE EX REL. MUNSELL V. COURT OF OYER AND TERMINER.

(101 N. Y., 245.)

CONTEMPT: *Misconduct of jurors—Civil and criminal contempts.*

1. CONTEMPT—MISCONDUCT OF JUROR.—A juryman, during a recess upon a criminal trial, having proceeded, without the permission of the court, to the scene of the affray to acquaint himself with the locality, is not guilty of a criminal contempt for which he could be summarily punished by the court.
2. DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPTS.—A civil contempt may go beyond the statutory enumeration and include what was usual or permissible at common law; but a public or criminal contempt is precisely defined and barred in by the statute enumeration.¹

De Lancey Nicoll, for appellant.

John Vincent and Ira Shafer, for respondent.

FINCH, J. The occasion and result of proceedings for contempt furnish a clear and well-defined line of division, separating them into two classes, which have become somewhat mingled and confused by the use of a fixed but ambiguous nomenclature. *In re Watson*, 3 Lans., 408. There may prove to be rare and exceptional cases which do not easily fall within either class, or some which so commingle the characteristics of both as to make their location doubtful and difficult; but, in the main, the division is exhaustive and clear. In one class are grouped cases whose occasion is an injury or wrong done to a party who is a suitor before the court and has established a claim upon its protection, and which result in a money indemnity to the litigant, or a compulsory act or omission enforced

¹See note.

for his benefit. In these cases the authority of the court is indeed vindicated, but it is, after a manner, lent to the suitor for his safety and vindicated for his sole benefit. The authority is exerted in his behalf as a private individual, and the fine imposed is measured by his loss and goes to him as indemnity; and imprisonment, if ordered, is awarded, not as a punishment, but as a means to an end, and that end the benefit of the suitor in some act or omission compelled, which are essential to his particular rights of person or of property. This clearly appears from the mode of enforcing the suitor's remedy prescribed by the statute. Code Civil Proc., §§ 2284, 2285. A fine may be imposed to indemnify his actual loss. Where such is not shown, the fine must not exceed his costs and expenses, and \$250 in addition thereto, and in both cases be paid over to the suitor. The imprisonment, where the act or duty can yet be performed, must end with the performance of the act and payment of the fine; but if the act or duty cannot be performed, then the imprisonment must not exceed six months and until the fine be paid. In this last provision there is a trace of the element of punishment, but it is for the violation of the private right of the party, and to check similar violations in the future, and has no respect to public offenses or the vindication of public wrongs. The people may be such a party, but only when, like individuals, they are seeking a civil right or remedy which the misconduct complained of tends to defeat or impede; in other words, when they stand in the attitude of private suitors, seeking to enforce their private rights. If, in this class of cases, there exist traces of a vindication of public authority, they are but faint, and utterly lost in the characteristic, which is strongly predominant, of protection to private rights imperiled or indemnity for such rights defeated. These cases have been usually described as proceedings for the enforcement of civil remedies, and, more briefly, as civil contempts, and because the great volume of instances occur in the progress of civil actions; but they may also occur in criminal actions or proceedings, as we shall presently see, and constitute then what I imagine the learned counsel for the appellant had in his mind when he spoke of "*quasi* civil contempts." If we describe this first class of contempts as private contempts, because their occasion and result is, primarily and in the main,

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The second class of contempts consists of those whose cause and result are a violation of the rights of the public as represented by their constituted legal tribunals, and a punishment for the wrong in the interest of public justice, and not in the interest of an individual litigant. In these cases, if a fine is imposed its maximum is limited by a fixed general law, and not at all by the needs of individuals; and its proceeds, when collected, go into the public treasury, and not into the purse of an individual suitor. The fine is punishment, rather than indemnity, and if imprisonment is added it is in the interest of public justice, and purely as a penalty, and not at all as a means of securing indemnity to an individual. Necessarily, these contempts, in their origin and punishment, partake of the nature of crimes, which are violations of the public law, and end in the vindication of public justice, and hence are named criminal contempts. As described in the statute, an element of wilfulness or of evil intention enters into and characterizes them. They are a disturbance of the court, which interferes with its performance of duty as a judicial tribunal; wilful disobedience to its lawful mandate; resistance to such mandate, wilfully offered; contumacious and unlawful refusal to be sworn as a witness or to answer a proper question; and publication of a false and grossly inaccurate report of its proceedings. These cases and their punishment are placed under the head of "general powers of the courts and their attributes," and they very evidently relate to public offenses tending to cast discredit upon the administration of public justice and having no reference to the particular rights of suitors. But here, again, we find that they occur as well in civil as in criminal actions, and so, for convenience, we may speak of them, in view of the present classification, as public contempts, although the established legal nomenclature must remain unchanged.

We have, then, two distinct classes — private contempts and public contempts — with which we are to deal, for the purposes of this case. Both were known to and recognized by the common law, and the courts were held to possess an inherent power of punishing, by process of contempt, any disregard of

their authority, both for the benefit of their suitors and for the protection of their own order and dignity. Necessarily, the common law power was very broad, and vested large discretion in the courts. These became, in some instances, both accuser and judge, and this was especially so where the contempt was of a public nature, and no private person stood as complainant and sufferer. When the Revised Statutes were enacted, an evident effort was made to codify the law of contempt, and bring it within definite and fixed rules (1 R. S., 534, § 1; id., 278, § 10), and the effort plainly recognized the difference between the two classes. The first, or private contempts, were described as those "by which the rights or remedies of a party in a cause or matter depending in such court may be defeated, impaired, impeded or prejudiced in the following cases." After a very careful and specific enumeration it was still recognized that, in the multitude of private rights, other and unnamed cases might occur, and to meet that emergency subdivision 8 was added, which retained the power in "all other cases where attachments and proceedings as for contempts have been usually adopted and practiced in courts of record, to enforce the civil remedies of any party to a suit in such court, or to protect the rights of any such party." By this clause the common law right as to private contempts was preserved outside of and beyond the statute enumeration, and this was deemed safe and prudent, because, in cases affecting only private rights, and wrongs done merely to the suitor, the courts would be under little or no temptation to unduly strain or exercise their power. But the situation was entirely different as to public contempts. As to these, the court contemned was the court which adjudged and punished; and that summarily and without the intervention of a jury. Here precise limitations were needed, and any shred or remnant of undefined common law power was deemed dangerous, and so the legislature decreed that "every court of record shall have power to punish as for a criminal contempt persons guilty of either of the following acts, *and no others*." Observe the difference in the two acts founded upon the inherent difference between the two classes. The private or civil contempt might go beyond the statutory enumeration, and include also what was usual or permissible at common law. But the public or criminal contempt was precisely defined and

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barred in by the statute enumeration. The phrase "and no others" implies that there were or might be other and non-enumerated offenses, answering the description or characteristics of public contempts, which, but for the statute, might be so deemed and punished; and all these it was affirmatively intended to shut out, at least until subsequent legislation should let them in. So that for the criminal contempt we may look only to the statute, while for the private or civil contempt we may resort, if need be, to the common law. These two statutes have been substantially copied into our codes (Code Civil Proc., §§ 8, 14; Penal Code, § 143). Outside of the criminal contempts enumerated, there were very many offenses of that general character which could not be so punished, but were reached by making them misdemeanors, and giving the culprit a trial before a jury; and any omitted case not covered by one or the other of these remedies may be easily met by further legislation.

Other provisions of the codes, to which we have been referred, may have been enacted without keeping this classification in view; but if some confuse, none of them destroy it. By section 243 of the Code of Criminal Procedure, a grand juror may be challenged as a minor, an alien, or insane, or as prejudiced and not impartial towards the party challenging; and by section 243 his attempt to serve is punishable as a contempt. It is not called a criminal or public contempt, and is not made such; but in its nature was evidently deemed an act which rather violated the private or particular right of the party challenging, and so belonged, as it was left by the code, in the class of private contempts occurring in a criminal action. By section 344, and those which follow, a prisoner may apply to remove his case from a court in which the indictment is pending, and for that purpose may apply to a judge for a stay; but if the application is denied a further appeal to another judge is forbidden, and made punishable as a contempt. Here, again, the prohibited act respects primarily the private right of the accused, and is classed as a simple contempt, and not denominated criminal. But since it does also respect public justice, and there is no suitor to be indemnified, it hardly belongs where it is placed, and some consciousness of this is evidenced by the further provision of the section that it shall

also be punished as a misdemeanor. Section 619 makes disobedience to a subpoena, or refusal to be sworn or testify, a criminal contempt, and section 635 extends that to a conditional examination.

It seems to me thus entirely clear that an act which is not a private contempt, and is not enumerated among criminal contempts, is not a contempt at all, although it may be and very often is punishable as a misdemeanor. There is no difficulty about the statute (2 R. S., Edm. ed., p. 759, § 14) to which the learned district attorney refers us, as making all contempts in civil cases applicable to criminal trials. The private contempts are so applicable when they in fact occur. The statute in question accomplished nothing except to make the form and manner of proceeding adopted to punish contempts in civil cases apply to contempts on criminal trials so far as in their nature applicable. It did not change the definition of contempts, or destroy or confuse the statute classification. *People v. Restell*, 3 Hill, 289, 295. The extended application of the statute was intimated in *People v. Hackley*, 24 N. Y., 74, 78, but the essential characteristics of contempts were not confused or altered.

There remains to us the inquiry whether the act of the juror in this case was a contempt at all. It is conceded that it was not a criminal contempt, because not one of those enumerated in the statute. It certainly was not a private or civil contempt, for it invaded no right of an individual suitor before the court, and involved no question of duty or indemnity to an individual litigant. On a criminal trial a verdict of acquittal was rendered, which shocked the sense of justice and aroused the indignation of the learned trial judge. It then appeared that Munsell, one of the jurymen, had gone to the scene of the affray for the purpose of acquainting himself with the locality. It is not alleged that he obtained any information. For that act he was committed for a contempt. On the face of the order it is recited that he wilfully disobeyed the command of the court. If that was true, there was a criminal contempt; but it is here conceded not to be true, and that no order of the court was disobeyed. Certainly this was not a private or civil contempt. It is said the people were a party, and their rights were invaded, and so were to be protected. But the people

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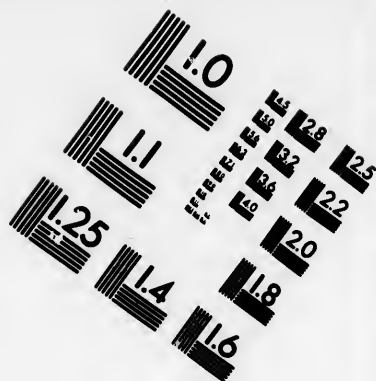
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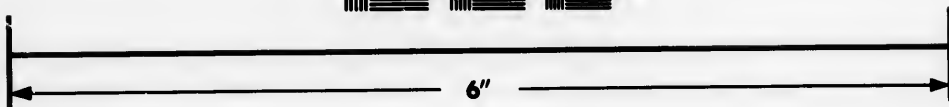
were the public, and their rights were the rights of public justice, and the offense, if one at all, was a public offense. The phrase "to protect the rights of any *such* party" means a party entitled to "civil remedies" in his action, and wielding the power of the court for his private and personal benefit. It is true that in every criminal action the people, as parties plaintiff, have rights to be cared for in its progress. But these rights are generally of a public character and respect the protection of society. As in private contempts there are traces of a vindication of public authority, so in public contempts there are vindications of private rights, but, as in the other instance, lost and overwhelmed in the predominating characteristics of the class. Upon a criminal trial there is often behind the people an individual complainant who has suffered in his rights of person or of property, and more or less interested in the prosecution; but he is not permitted to be a party. He must go elsewhere to redress his wrong, and it is not his right which is being enforced, but that of public justice, with a view to the public safety; and the logical result of this must be that, on a criminal trial, a disrespect to or defiance of the court, which does not injure the private right of the accused and calls for no vindication on his behalf, is either a criminal contempt or a misdemeanor, or both, but cannot be a private or civil contempt.

The distinction between the two classes of contempts was observed very soon after the statutes were passed. In a civil action decided in 1831, which the appellant cites, a party broke open books sealed up in the master's office, which was a contempt at common law. The chancellor said: "Upon my first examination of the Revised Statutes, I was inclined to think that the section which defines criminal contempts had deprived the court of the power of punishing the improper conduct;" and then he holds that it was a civil or private contempt, within subdivisions 2 and 8, because it was a case in which the rights of the adverse party were materially involved.

We need not determine whether this juror was guilty of any offense whatever; for if we should assume that he was, for the sake of the argument, and that what he did was unlawful and prohibited, his act would have been a criminal contempt but for the statute bar. It would have invaded no private



A resolution test chart featuring several groups of horizontal and vertical lines of varying thicknesses. Each group is accompanied by a numerical value indicating the resolution. The values include 1.0, 1.1, 1.25, 1.4, 1.6, 1.8, 2.0, 2.2, 2.5, 2.8, 3.2, 3.6, 4.0, 4.5, 5.0, 5.6, 6.3, 7.1, 8.0, 9.0, 10, 11.2, 12.5, 14, 16, 18, 20, 22.5, 25, 28, 32, 36, 40, 45, 50, 56, 63, 71, 80, 90, 100, 112, 125, 140, 160, 180, 200, 225, 250, 280, 320, 360, 400, 450, 500, 560, 630, 710, 800, 900, 1000, 1120, 1250, 1400, 1600, 1800, 2000, 2250, 2500, 2800, 3200, 3600, 4000, 4500, 5000, 5600, 6300, 7100, 8000, 9000, 10000, 11200, 12500, 14000, 16000, 18000, 20000, 22500, 25000, 28000, 32000, 36000, 40000, 45000, 50000, 56000, 63000, 71000, 80000, 90000, 100000, 112000, 125000, 140000, 160000, 180000, 200000, 225000, 250000, 280000, 320000, 360000, 400000, 450000, 500000, 560000, 630000, 710000, 800000, 900000, 1000000, 1120000, 1250000, 1400000, 1600000, 1800000, 2000000, 2250000, 2500000, 2800000, 3200000, 3600000, 4000000, 4500000, 5000000, 5600000, 6300000, 7100000, 8000000, 9000000, 10000000, 11200000, 12500000, 14000000, 16000000, 18000000, 20000000, 22500000, 25000000, 28000000, 32000000, 36000000, 40000000, 45000000, 50000000, 56000000, 63000000, 71000000, 80000000, 90000000, 100000000, 112000000, 125000000, 140000000, 160000000, 180000000, 200000000, 225000000, 250000000, 280000000, 320000000, 360000000, 400000000, 450000000, 500000000, 560000000, 630000000, 710000000, 800000000, 900000000, 1000000000, 1120000000, 1250000000, 1400000000, 1600000000, 1800000000, 2000000000, 2250000000, 2500000000, 2800000000, 3200000000, 3600000000, 4000000000, 4500000000, 5000000000, 5600000000, 6300000000, 7100000000, 8000000000, 9000000000, 10000000000, 11200000000, 12500000000, 14000000000, 16000000000, 18000000000, 20000000000, 22500000000, 25000000000, 28000000000, 32000000000, 36000000000, 40000000000, 45000000000, 50000000000, 56000000000, 63000000000, 71000000000, 80000000000, 90000000000, 100000000000, 112000000000, 125000000000, 140000000000, 160000000000, 180000000000, 200000000000, 225000000000, 250000000000, 280000000000, 320000000000, 360000000000, 400000000000, 450000000000, 500000000000, 560000000000, 630000000000, 710000000000, 800000000000, 900000000000, 1000000000000, 1120000000000, 1250000000000, 1400000000000, 1600000000000, 1800000000000, 2000000000000, 2250000000000, 2500000000000, 2800000000000, 3200000000000, 3600000000000, 4000000000000, 4500000000000, 5000000000000, 5600000000000, 6300000000000, 7100000000000, 8000000000000, 9000000000000, 10000000000000, 11200000000000, 12500000000000, 14000000000000, 16000000000000, 18000000000000, 20000000000000, 22500000000000, 25000000000000, 28000000000000, 32000000000000, 36000000000000, 40000000000000, 45000000000000, 50000000000000, 56000000000000, 63000000000000, 71000000000000, 80000000000000, 90000000000000, 100000000000000, 112000000000000, 125000000000000, 140000000000000, 160000000000000, 180000000000000, 200000000000000, 225000000000000, 250000000000000, 280000000000000, 320000000000000, 360000000000000, 400000000000000, 450000000000000, 500000000000000, 560000000000000, 630000000000000, 710000000000000, 800000000000000, 900000000000000, 1000000000000000, 1120000000000000, 1250000000000000, 1400000000000000, 1600000000000000, 1800000000000000, 2000000000000000, 2250000000000000, 2500000000000000, 2800000000000000, 3200000000000000, 3600000000000000, 4000000000000000, 4500000000000000, 5000000000000000, 5600000000000000, 6300000000000000, 7100000000000000, 8000000000000000, 9000000000000000, 10000000000000000, 11200000000000000, 12500000000000000, 14000000000000000, 16000000000000000, 18000000000000000, 20000000000000000, 22500000000000000, 25000000000000000, 28000000000000000, 32000000000000000, 36000000000000000, 40000000000000000, 45000000000000000, 50000000000000000, 56000000000000000, 63000000000000000, 71000000000000000, 80000000000000000, 90000000000000000, 100000000000000000, 112000000000000000, 125000000000000000, 140000000000000000, 160000000000000000, 180000000000000000, 200000000000000000, 225000000000000000, 250000000000000000, 280000000000000000, 320000000000000000, 360000000000000000, 400000000000000000,



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right,—no right of a mere suitor seeking a personal remedy for a wrong done him,—but would have struck at public justice, and the vigor and honesty of its administration,—have been a disrespect to the court and a defiance of the public law, causing to miscarry a public prosecution. It is very certain that the learned trial court so understood and so dealt with it. The punishment adjudged was precisely the maximum of that fixed for criminal contempts both as to the fine and the imprisonment. There was no trace of indemnity to the people as plaintiffs. Their costs and expenses were not ascertained or considered or sought to be reimbursed. Nothing was meant but punishment for a public offense, to be dealt with as such. The court said the extreme punishment permissible was inadequate, but should be imposed. But thirty days in jail and \$250 fine was not the limit if this was a civil or private contempt. In that case both might have been greater; and in imposing the penalty upon the juror the court described it as "punishment for his misconduct." If there was misconduct the act would have been a criminal contempt but for the prohibition lodged in the words "no others." Those words are meaningless on the theory of the prosecution; for if the people are to be deemed like private suitors, and whenever their rights are infringed there may be a *quasi* civil contempt, and that punished, as was this juror, precisely as if guilty of a criminal contempt, the whole statute and its prohibition is a complete absurdity. The roads are open on both its flanks. We cannot so construe it. We think the general term were right in saying that the juror could not be punished for a contempt. The order of the general term should be affirmed.

Order affirmed.

(All concur.)

NOTE.—Jurors receiving a bribe to influence their verdict are guilty of a contempt. *Harrison v. Rowan*, 4 Wash. C. C., 32.

A juror is guilty of contempt in corruptly conferring with a party to a suit during the trial, it appearing that the court had expressly forbidden the jury to converse with any one regarding the case. *In re May*, 1 Fed. Rep., 737.

A juror voluntarily expressing an opinion of the guilt of the prisoner, for the purpose of being excused, for disqualification, is guilty of a contempt. *U. S. v. Devaughan*, 3 Cranch, C. C., 84.

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It is contempt of court for a juror, after retiring, to hold a conversation with others than officers of the court, *State v. Helvenston*, R. M. Charl., 48.

Contempt of court is a specific criminal offense whether punished summarily by the court or after trial upon indictment.—According to Bouvier "a crime is an offense against a public law."

In *Com. v. Myers*, 1 Va. Cases, 188, which is a leading case upon questions decided therein, White, presiding judge, who delivered the opinion of the full bench, in defining the meaning of the words "crime or offense," as used in the statute under consideration in that case, says:

"In legal acceptance these words are synonymous terms, although the word *crime* is often used to denote offenses of the higher grades. 1 Haw., p. 1; Black. Com., pp. 4 and 5. In the same (fifth page of 4 Blackstone's Commentaries), we are told that crime consists in doing an act in violation of a public law; and in the second page of the same book, that the law teaches the grades of every crime, and adjusts to it its adequate and necessary punishment. *Crime, or offense*, then, is the doing an act in violation of a public law; and the different degrees of atrocity which attend its commission fix the degree of the crime.

In *Pasmore Williams' Case*, 26 Pa. St., 9, which was an application to the supreme court of Pennsylvania for a writ of *habeas corpus*, wherein the petitioner complained that he was held in custody under a commitment of the district court of the United States for a contempt of that court in refusing to obey its process, the process which he was confined for disobeying was a *habeas corpus* commanding him to produce the bodies of certain colored persons claimed as slaves under the law of Virginia. Mr. Justice Jeremiah S. Black, after discussing the other questions presented in the case, said: "It must be remembered that contempt of court is a specific criminal offense. It is punished sometimes by indictment and sometimes in a summary proceeding, as it was in this case. In either mode of trial the adjudication against the offender is a conviction, and the commitment, in consequence, is execution. 7 Wheat., 38. This is well settled, and, I believe, has never been doubted. Certainly, the learned counsel for the prisoner have not denied it. The contempt may be committed with some particular cause, or it may consist in misbehavior, which has a tendency to obstruct the administration of justice generally. When it is committed in a pending cause, the proceeding to punish it is a proceeding by itself. It is not entitled in the cause pending, but on the criminal side. Wall., 134. The record of a conviction for contempt is as distinct from the matter under investigation, when it was committed, as an indictment for perjury is from the cause in which the false oath was taken. Can a person convicted of perjury ask us to deliver him from the penitentiary on showing that the oath on which the perjury is assigned was taken in a cause of which the court had no jurisdiction?"

In the case of *New Orleans v. Steamship Company*, 20 Wall., 387, Mr. Justice Swayne, delivering the opinion of the court, said:

"The fine of \$300 imposed upon the mayor is beyond our jurisdiction. Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case. That part of the decree is as distinct

from the residue as if it were a judgment upon an indictment for perjury committed in a deposition read at the hearing. This court can take cognizance of a criminal case only upon a certificate of division in opinion."

The question in the case of *United States v. Berry and others*, 24 Fed. Rep., 780, was, whether a proceeding in contempt for interfering with a receiver appointed by a United States court could be held in a division of the district other than the one in which the offense was committed. Judge Krekel, after discussing the question, said:

"Assuming that proceedings for contempt are criminal in their nature, the question remains, can they be had in a division of the district other than the one in which the offense was committed? . . . The conclusions reached are that the proceedings in contempt are criminal in their nature; that they must be had in court and under the law dividing the western district of Missouri in the division in which the offense was committed. The order will be that all of the defendants be discharged, principals and sureties on recognizances be released, and the sentences heretofore passed be held for naught."

See opinion of McCrary, circuit judge, *In re Ellerbe*, 13 Fed. Rep., 530, to the same effect; and also the opinion of Dyer, J., in *Kirk v. M. D. C. Mfg. Co.*, 26 Fed. Rep., 501. See, also, *B. & O. R. R. Co. v. Wheeling*, 13 Grattan (Va.), 57.

A proceeding in contempt, in a federal court, is a criminal case to be prosecuted in the name of the United States. *Riggs v. Supervisors*, 1 Woolw., 377; *Ex parte Kearney*, 7 Wheat., 38; *New Orleans v. Steamship Co.*, 20 Wall., 387.

And in *Phillips v. Welsh*, 11 Nev., 190, the court say: "If the contempt consists in the refusal of a party to do something which he is ordered to do for the benefit or advantage of the opposite party, the process is civil and he stands committed till he complies with the order. The order in such case is not punitive, but coercive. If, on the other hand, the contempt consists in the doing of a forbidden act, injurious to the opposite party, the process is criminal and conviction is followed by a penalty of fine or imprisonment, or both, which is purely punitive. In the former case the private party alone is interested in the enforcement of the order, and the moment he is satisfied, the imprisonment terminates; in the latter case the state alone is interested in the enforcement of the penalty. . . . The principle of discrimination between the civil and criminal process for contempt here indicated, though not expressly recognized in any of the cases that have fallen under our observation, is entirely consistent with all the decisions, and is the only means of rendering them consistent with each other. It may, therefore, be considered established by them."

In *Ex parte Grace*, 12 Iowa, 208, it appears that one Noxon recovered judgment against Grace, and the execution issued thereon being returned unsatisfied, he obtained an order from the county judge of Scott county for the appearance before him of said debtor, for examination, under chapter 120 of the Revision of 1860. Upon this examination it was found by the county judge that the debtor had money in his possession which he refused to deliver up, to be applied toward the satisfaction of the judgment, though ordered so to do. The debtor persisting in his disobedience to this order, it was directed that he be imprisoned until he comply with the same. Grace

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then applied to the Hon. John F. Dillon, district judge, for his discharge from custody, being restrained of his liberty by the jailer of the county. The writ of *habeas corpus* issued, and upon the hearing thereof Grace was discharged; from the order discharging him the jailer and the district prosecutor, on behalf of the state, appealed. Affirming the judgment discharging the prisoner Wright, J., says:

"Chapter 126 of the Revision, so far as it bears upon the question involved, is in substance as follows: If an execution is issued upon a judgment and returned unsatisfied in whole or in part, the owner of the judgment may obtain an order for the appearance and examination of the debtor. The like order may be obtained at any time after the issuing of an execution, upon proof, by affidavit or otherwise, that the debtor has property which he unjustly refuses to apply towards the satisfaction of the judgment. This order may be obtained, among other officers, from the judge of the county court. On his appearance, the debtor may be interrogated in relation to any fact calculated to show the amount of his property, the disposition he has made of it, or any other matter pertaining to the purpose for which the examination may be made. Witnesses may be produced and examined in the same manner as upon the trial of an issue. If property, subject to execution, is thus ascertained, an execution may be issued and it be levied upon accordingly. The judge may order any property of the debtor, not exempt, in the hands of himself or others, to be delivered up, or in any other mode applied to the payment of the judgment. Should the debtor fail to appear after being personally served, or fail to make full answer to all proper interrogatories, he will be guilty of a contempt, and may be arrested and imprisoned until he complies with the requirements of the law in this respect. And if any person disobey any order of the court or judge, duly served, he may be punished as for a contempt.

"It was for disobedience of an order to pay over money found to be in his pocket that petitioner was ordered to be punished as for contempt. He claims that this law is repugnant to sections 9, 10 and 19 of article 1 of the constitution, and void. These sections are: 9. 'The right of trial by jury shall remain inviolate; but the general assembly may authorize a trial by a jury of a less number than twelve men in inferior courts; but no person shall be deprived of life, liberty or property without due process of law.' 10. 'In all criminal prosecutions, and in cases involving the life or liberty of an individual, the accused shall have a right to a speedy and public trial by an impartial jury,' etc. 19. 'No person shall be imprisoned for debt in any civil action on mesne or final process, unless in case of fraud,' etc.

"It will be observed that chapter 126 is a substitute for chapter 111 of the old code, and that in many of their features they are alike. Two important differences, however, may be noticed. The one is giving the power to the examining officer, or court, to order any property of the debtor in the hands of himself or others to be delivered up and applied to the satisfaction of the judgment. The other, that which gives the power to punish, as for a contempt, any person who shall disobey any order of the court or judge in the premises.

"So again, the new constitution differs from the old, by adding to section 9 the words: 'but no person shall be deprived of life, liberty or property without due process of law.' And to section 10: 'and in cases involving

the life or liberty of an individual.' Section 19 is the same in both instruments.

"If this case turned alone upon the ground that the act was repugnant to section 19, we should not be inclined to give much weight to the argument. . . .

"When the act is measured by the other provisions of the constitution, however, there is more doubt and difficulty. This doubt arises in view of those provisions which give the right to a trial by a jury in all cases 'involving the life and liberty of an individual,' and which declare that no one shall be deprived of his liberty without due process of law.

"It is claimed by counsel that the change in section 10 of the bill of rights was only intended to meet the case of a fugitive slave. Whatever may have been the primary motive of some or all of the members of the constitutional convention, in incorporating this provision, we can certainly see no reason in the nature of things, nor in the language employed, to justify the conclusion that white men were not also entitled to the benefit of it. We cannot believe that it was intended to give the right of trial by jury to the occasional fugitive slave found in our state, and to withhold it in cases of equal magnitude and vital importance, from the half million of free white inhabitants of the state.

"Again, it is suggested that this right applies to suits at law. This is true, but the legislature cannot, by an invasion of the constitution, make that a proceeding to punish for a contempt, which in its essence is a suit at law. That is to say, if the party is secured by the constitution a jury trial in all cases involving his liberty, and if he is guaranteed due process of law before he can be deprived of this liberty, and it be true, at the same time, that these provisions have reference to suits at law, it would by no means follow that these safeguards could be frittered away and broken down by styling every proceeding to punish for a disobedience of 'the order of a court or judge, a proceeding to punish for contempt or someth. . . else, instead of a suit, an action, a trial. If by 'due process of law,' in the language of Brown, J., in *Taylor v. Porter*, 4 Hill, 140, is meant no less 'than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt, or determining the title to property,' then the legislature cannot, under the guise of punishing a party for a contempt, provide for condemning without hearing, for rendering judgment without inquiry, nor without such hearing and inquiry as he should have by due process of law. Another exposition of the phrase 'due process of law' is the right of trial according to the process and proceedings of the common law, or law in its regular course of administration through courts of justice.' 9th ed. Kent, vol. 1, 621; 3 Story on Const., 264, 661. And would it be claimed, under this definition, that by an investigation, provided for by statute, unusual and unheard of at common law, or in the known and regular course of the administration of the law through courts of justice, that the citizen, if imprisoned thereunder, was deprived of his liberty by due process of law."

It was a strong court who rendered this decision. Ralph P. Lowe, Caleb Baldwin and George G. Wright are names that will always remain prominent in the judicial history of Iowa. The name of John F. Dillon, who issued the writ, then judge of a court of inferior jurisdiction, is not confined

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The provisions of the constitution of the state of Iowa which give the right of trial by jury in all cases involving the life or liberty of an individual, and which declare that no one shall be deprived of his liberty without due process of law, are still supposed to be the fundamental law of that state. But the very thing which the supreme court of Iowa, as then constituted, declared the legislature could not do, has been done by recent amendments to the prohibitory liquor laws of that state, and the supreme court of Iowa as now constituted decides that it can be done.

CHRISMAN v. THE STATE.

(18 Neb., 107.)

CORRUPTING WITNESSES: *Indictment — Allegations — Evidence.*

1. ALLEGATIONS.— It is not necessary to allege that a witness in a judicial proceeding was sworn, recognized or subpoenaed in such judicial proceeding.
2. EVIDENCE.— When such judicial proceeding involved a trial upon an indictment for a crime or misdemeanor, it was not error to admit in evidence, upon the trial of the case at bar, the said indictment, with the name of such witness attempted to be corrupted indorsed thereon as a witness, on the part of the state.

Error to the District Court for Gage County.

Hazlett & Bates, for plaintiff in error.

William Leese, attorney-general, for the state.

COBB, C. J. The plaintiff in error was indicted, tried and convicted in the district court of Gage county for the offense of attempting to corrupt and influence, and of corrupting and influencing, one C. R. Woodard by offering to and paying him, the said C. R. Woodard, a sum of money to leave the country and go beyond the jurisdiction and process of the state, and

not appear against him, or testify against him as a witness in a certain criminal proceeding then pending against him. The defendant demurred to the indictment, on the ground that the same did not contain facts sufficient to constitute a crime under the laws of the state of Nebraska, which demurrer was overruled. A trial was had to the court, a jury being waived. The court found the defendant guilty, overruled his motion for a new trial, and sentenced him to pay a fine of \$500 and be imprisoned in the county jail for a period of thirty days, etc.

The first point presented by plaintiff in error in his petition in error, and urged in the brief of counsel, arises upon the overruling of the demurrer to the indictment. In order to the consideration of this point, I copy the substantial part of the indictment:

"That Joseph Chrisman, . . . being then and there charged with a criminal offense, and duly indicted under lawful authority by the grand jury of said county, of the December term of the district court of said county, in the year 1883, for the crime of cutting one C. R. Woodard with intent to kill him, the said C. R. Woodard, in the county of Gage and state of Nebraska aforesaid; and he, the said Joseph Chrisman, being then and there held to bail under said charge to appear at the February term of said district court aforesaid, the said court having jurisdiction of the said offense, unlawfully did then and there attempt to corrupt and influence, and did corrupt and influence, one C. R. Woodard, then and there being, by offering to and paying to him, the said C. R. Woodard, the sum of \$50, with the further offer and promise to the said C. R. Woodard of the further sum of money of \$525, to corruptly and unlawfully influence and procure him, the said C. R. Woodard, to leave the said county of Gage and state aforesaid, and go beyond the jurisdiction and process of said district court, and secrete himself so that the said C. R. Woodard could not be obtained as a witness on the part of the state of Nebraska in the said action aforesaid, against the said Joseph Chrisman aforesaid; the said C. R. Woodard being then and there a very important in said action, and in fact the prosecuting witness in the said cause so pending as aforesaid against the said Joseph Chrisman; and so the grand jurors aforesaid do say that the said Joseph Chrisman then and there,

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in the manner and form aforesaid, unlawfully and wilfully did attempt to influence, and did influence and corrupt, the said C. R. Woodard, a witness as aforesaid, by money and promises as aforesaid, well knowing that the said C. R. Woodard was a witness as aforesaid," etc.

The section of the statute under which this indictment was found is section 164 of the Criminal Code, and is in the following words:

"Section 164. If any person shall attempt to corrupt or influence any juror or witness, either by promises, threats, letters, money, or other undue means, either directly or indirectly, every person so offending shall be fined in any sum not exceeding \$500, and imprisoned in the jail of the county not exceeding thirty days."

It is urged that the indictment fails to charge an offense under the provisions of the section quoted. There is an evident omission of the word "witness" where it should have first occurred in the form of indictment used. But I think it sufficiently appears on the face of the indictment that C. R. Woodard was a witness in the action then pending in said court and set out in the indictment. The indictment expressly alleges that the said C. R. Woodard was the prosecuting witness in said cause, and I am at a loss to perceive how he can be held to be any the less a witness because he is the prosecuting witness. I think the word "witness" is used in the section above quoted in a broad sense, and that it is not necessary that the witness should be alleged to have been either subpoenaed or recognized to appear and testify as a witness in the case. If I am right in this view, then it is sufficient in the indictment to describe the person corrupted as a witness; nor do I think that the use of the word "prosecuting," as qualifying the word "witness," vitiates or changes its meaning. If the person accused is guilty of the offense charged, he generally knows who are the witnesses who can testify against him as well before as after they are recognized or subpoenaed, and an interpretation of the law that would leave him free to corrupt them until after they are sworn, or even recognized on subpoena, is certainly inadmissible.

There was evidence tending to prove that the money was paid and promise made by the plaintiff in error to Woodard

for the purpose of inducing him not to appear' and testify at the trial.

There was no error in the admission of the indictment, with the name of Woodard indorsed thereon as a witness, as evidence at the trial; as we have seen, evidence that Woodard was a witness on the trial of the case in which the indictment was the principal pleading was responsive to the principal point made in the case.

The judgment of the district court is affirmed.

Judgment affirmed.

(The other judges concur.)

STATE V. BARBEE.

(92 N. C., 820.)

DRUNKENNESS: Evidence — Intent — Instructions.

1. DRUNKENNESS — INTENT — EVIDENCE OF — PRAYERS FOR INSTRUCTIONS, — the law presumes that every one intends to produce the consequences that result from his acts, but this presumption is not conclusive, but only *prima facie* evidence of the intent.¹
2. Where the defendant was indicted under section 1100 of the code, for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted.
3. The defendant only has the right to ask for special instructions before the case is given to the jury, but if, after the jury have retired, the court should recall them and instruct them further, the defendant can except if the charge is incorrect.

This was an indictment for shooting at a railroad train, tried before Shepherd, judge, and a jury, at spring term, 1885, of Durham superior court.

There was evidence tending to show that the defendant shot at the passenger train on the North Carolina Railroad, as charged in the indictment. That shortly before the shooting his pistol was taken away from him, when he demanded it, drew his knife and threatened to cut the person who had gotten his

¹ See note.

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pistol from him. That when his pistol was restored to him he fired three times at the train, while within range of his pistol, but there was no evidence that the train was actually struck. The defendant introduced evidence tending to show that at the time he was helplessly drunk.

The defendant asked the court to charge the jury: 1. That there was no evidence of any intent on the part of the defendant to injure the cars, or any one on them. 2. That in the absence of such intent, it was the duty of the jury to acquit, the intent being an ingredient of the offense. His honor refused the first instruction, and gave the last, and charged the jury as set out in the opinion of the court.

After the jury had retired to consider of their verdict, the defendant presented certain prayers for instruction, and requested the court to give them to the jury, if they should ask further instructions from the court. The jury did ask for further instructions in regard to the presumption as to the intent. The court charged them as set out in the opinion, but did not give the special charges asked by the defendant.

There was a verdict of guilty, and from the judgment pronounced thereon the defendant appealed.

Attorney-General and Batchelor & Devereux, for the state.

Mr. E. C. Smith, for the defendant.

MERRIMON, J. The defendant is indicted for shooting "a missile, pellet, shot and bullet at, against and into, a certain railroad car, locomotive and train, . . . with intent to injure the said car and locomotive," in violation of the statute (Code, sec. 1100).

The court refused to instruct the jury, as the defendant requested it to do, that there was no evidence of his *intent* to injure the car as charged, and he excepted.

There is not the slightest foundation for this exception. The case states that there was evidence tending to show that "he (the defendant) was helplessly drunk," but it appears, also, that after his pistol had been taken from him, he drew his knife and threatened to cut the person who had it, got possession of it again, and discharged it three times at the train, first toward the locomotive as it approached, then at the train as it

passed him, then, turning, just after it passed him. A man who could thus deport himself certainly had capacity to have a purpose, and his act of itself indicated a design to injure the train.

Whatever evidence there may have been before the court and jury in respect to his state of intoxication, it is obvious there was evidence — some evidence — tending to show the intent charged in the indictment, and evidence that properly went to the jury, with other evidence, to be weighed and passed upon by them.

The court submitted the whole evidence to the jury, with the instruction that if "the defendant was so drunk that he did not know what he was doing, the *prima facie* case would be rebutted," and he would not be guilty. He could not reasonably ask, and the court was not authorized to say more, in view of the evidence.

Upon the question of intent, at the request of the defendant, the court charged "that, in the absence of such intent, it is the duty of the jury to acquit, the intent being an ingredient of the offense;" but the court added, that if the defendant wilfully and intentionally discharged his pistol at the train, as it was moving within range of his pistol, and such shooting, under the circumstances, would naturally and necessarily result in injury to the train, then "the law presumes that he intended such injury, and it devolved upon him to rebut the *prima facie* case as to the intent."

This instruction was substantially correct. The law presumes that every man intends to produce the consequences that necessarily result from his acts and conduct. This presumption, however, is not conclusive; it is evidence only so far as to prove a *prima facie* case in respect to the intent, and cast the burden of disproving it upon the defendant. If nothing further appeared than the shooting as described, the jury ought to have convicted; but if there was rebutting and opposing evidence, then it was for the jury to determine whether or not the presumption was disproved. The court thought there was evidence tending to rebut the presumption, and hence he gave the instruction as he did. He did not tell the jury that the presumption was conclusive; he told them just the contrary, and properly, that the burden was on the defendant to show

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that he did not have the intention attributed to and charged against him. The natural consequence of his shooting at the train within range of his pistol was to injure it in the sense of the statute, and the presumption was that he so intended, and, nothing else appearing, the jury ought to have convicted; but he offered evidence tending to rebut the presumption, and then it was the duty of the jury to determine whether or not he did successfully rebut it; they found by the verdict of guilty that he did not. *State v. Phifer*, 90 N. C., 721.

The defendant asked the court to give two special instructions to the jury. One of them it gave, the other it declined to give.

After the court gave the issue to the jury and they had retired to consider of their verdict, and had been absent some considerable time, the defendant requested the court to give the jury, if they should ask for further instructions, several special instructions as to the intoxication of the defendant and reasonable doubt, in respect to two or three aspects of the evidence. The jury returned some time afterwards, and requested the court to instruct them further as to the presumption of intent. The court did not give the special instructions prayed for by the defendant, nor make any reference to them in the presence of the jury, but in reply to their inquiry instructed them "that if the defendant knew what he was doing, and shot at the train under such circumstances as would naturally and necessarily result in injury to the train, or some passenger, the law presumes he intended such injury." This was strictly in reply to the inquiry of the jury and was substantially correct. The court might — perhaps ought — then, again to have told them, as it did in the charge at first given, that the presumption was not conclusive, that the defendant had the right to rebut it, and they could consider whether or not he had done so successfully; but in view of the explicit instructions it had already given, it was not bound to do so.

And, indeed, the instructions plainly indicated the right to rebut the presumption, and the effort of the defendant to do so, for the court said, "if the defendant knew what he was doing," etc., having reference to the exculpatory evidence. It did not necessarily mislead the jury. We cannot see, and it does not appear, that it probably did. The just and circum-

spect judge before whom the case was tried did not think so; if he had so believed, we are sure he would have promptly granted the motion made before him for a new trial.

The court was not bound to give the special instructions prayed for after the issue had been given to the jury. In the order of procedure in the trial, the defendant had the right, and the reasonable opportunity, to ask the court to give such instructions before the issue was given to the jury; after that, the court might, in its discretion, give or decline to give them. If this were not so, a party might vexatiously prolong the trial, confuse the jury, and perhaps disappoint the ends of justice. The defendant must ask for special instructions, as of right, in apt time in the progress of the trial, else the court may decline to give them. But if the court shall recall the jury and instruct them further, giving special or any instructions, it must give them correctly, else a party may except for error.

There is no error. The judgment must be affirmed, and to that end let this opinion be certified to the superior court according to law.

No error.

Affirmed.

NOTE.—Drunkenness.—In *Stat. v. Deaton*, 92 N. C., 788, it was held that the warrant was fatally defective for joining two defendants charged with being drunk in violation of a town ordinance, for the reason that drinking was a personal vice, and the offenses charged in the warrant are such as cannot be jointly committed.

And in *The People v. Langton*, 67 Cal., 427, it was held in a murder trial that drunkenness on the part of the defendant cannot form a legitimate matter of inquiry as between the crime of murder in the second degree and that of manslaughter. In this regard see, also, *Pirtle v. State*, 9 Humph., 663; *People v. Belenciar*, 21 Cal., 546, and *People v. Nichol*, 34 Cal., 215. Voluntary intoxication cannot, of itself, be set up as a defense to a prosecution for crime, because it is neither a justification nor an excuse therefor. See *United States v. Clappool*, 14 Fed. Rep., 127; *The State v. Bullock*, 13 Ala., 413; *Tidwell v. The State*, 70 Ala., 33; *Cross v. The State*, 55 Wis., 261; *Friery v. The People*, 54 Barb., 319; *State v. Thompson*, 12 Nev., 140; *Shannahan v. The Commonwealth*, 8 Bush, 464; *The State v. Turner*, Wright (Ohio), 20; *Boswell v. Com.*, 20 Grat., 860; *State v. Mullen*, 14 La. Ann., 570; *Rafferty v. The People*, 66 Ill., 118; *McKenzie v. The State*, 26 Ark., 335; *People v. Williams*, 43 Cal., 344; *Mereer v. The State*, 17 Ga., 146; *Schaller v. The State*, 14 Mo., 502; *People v. Cummins*, 47 Mich., 334; *State v. Grear*, 28 Minn., 420; *Kelley v. State*, 3 Smedes & M., 518; *Kenny v. People*, 31 N. Y., 330; *O'Brien v. The People*, 48 Barb., 274; *People v. Rogers*, 18 N. Y., 9; *Golden v. State*, 25 Ga., 527; *Com. v. Hart*, 2 Brewst., 546; *Com. v. Dougherty*, 1 Browne, 20; *Com. v. Hawkins*, 3 Gray, 463; *State*

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And insanity produced by continual drunkenness is not an excuse for crime, but a defense in prosecution therefor. See *Fisher v. State*, 64 Ind., 435; *Curter v. State*, 12 Tex., 500; *Beasley v. State*, 50 Ala., 149; *O'Brien v. People*, 48 Barb., 274; *Erwin v. State*, 10 Tex. App., 700; *State v. Dillahunst*, 3 Har. (Del.), 551; *State v. Till*, 1 Houst. Crim. Cas., 233; *Macconnehey v. State*, 5 Ohio St., 77; *United States v. Clarke*, 2 Cranch, C. C., 158; *Real v. People*, 42 N. Y., 270; *Schlencker v. State*, 9 Neb., 241; *Boswell's Case*, 20 Grat., 860; *United States v. Drew*, 5 Mason, 28; *Rennie's Case*, Lew., 76; *Reg. v. Dixon*, 11 Cox, 341; *Reg. v. Leigh*, 4 Fost. & F., 915.

The doctrine that drunkenness is always an aggravation of the crime, as some of the expressions in some of the cases in the United States would seem to hold (see *Com. v. Hart*, 2 Brewst., 546; *United States v. Forbes*, Crabbe, 559), is no longer the law. See *McIntyre v. People*, 38 Ill., 515; *Ferrell v. State*, 43 Tex., 503. And in those instances where intoxicating liquors are resorted to for the purpose of blunting the moral responsibility, drunkenness only serves to heighten the culpability of the offender. See *United States v. Claypool*, 14 Fed. Rep., 127.

SNAPP V. THE COMMONWEALTH.

(82 Ky., 173.)

EMBEZZLEMENT: Evidence — Indictment — Larceny.

1. TAX COLLECTOR AND HIS CLERK — THEIR RELATIONS. — Ferguson was back tax collector for the city of Louisville. Appellant was his clerk and cashier upon his employment. Held, that whatever moneys came into the hands of the principal or his clerk, in the discharge of their duties, came lawfully into the hands of both, and having the right to receive the money, appellant cannot be held to have committed a felony.
2. Where one comes into possession of money or property lawfully, he cannot become guilty of larceny by afterwards converting it to his own use.
3. Appellant was not an officer of the city of Louisville; he was Ferguson's clerk, and bound to account to him alone.
4. Although, where several felonies are parts of the same transaction, evidence of all is admissible on the trial of an indictment for one, yet the rule does not apply to a case like this, where a charge of larceny

alleged to have been committed on one day is attempted to be established by proof of another larceny committed on a different day.

5. Evidence of appellant's extravagant habits, or of expenditures beyond his salary, is incompetent.

Young & Trabue, P. B. Muir and Henry Clay, for appellant.

W. Hardin, attorney-general, and *A. G. Caruth*, commonwealth's attorney, for appellee.

Judge PRYOR delivered the opinion of the court.

The grand jury at the April term, 1883, of the Jefferson circuit court, returned an indictment against the appellant, Cope J. Snapp, containing two counts — one for embezzlement and the other for grand larceny. He was convicted of grand larceny and has appealed to this court.

It was alleged in the one count that while acting as clerk for one David Ferguson, back tax collector of the city of Louisville, he had embezzled \$342.87 of money belonging to the city, and in the other that he had feloniously taken and converted to his own use the same amount and the same sum of money, and was, therefore, guilty of grand larceny. The money said to have been the subject of the larceny was paid to the appellant by Clemerson in a check on one of the Louisville banks in discharge of taxes due by one Newman. The prosecution and the defense both established the fact that Ferguson was the back tax collector for the city from the month of April, 1881, to December, 1882, and it is a fact conceded, that during that period he was a defaulter to the city on account of moneys collected in a sum largely exceeding \$50,000. He was indicted for embezzlement, tried and convicted of the offense, and finally released from prison by executive interference.

The appellant Snapp was the chief clerk and cashier of Ferguson, and from the testimony seems to have had almost the entire control of the office and the moneys collected. Ferguson received for his services a commission on the amount collected, and employed Snapp (the accused) as his private clerk out of his own means, paying him for his services \$75 per month. Under the law defining his duties as back tax collector, Ferguson was required to settle his accounts with the

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city treasurer and pay over the money collected by him at the end of each week, but this he neglected to do, and settled once in two or three weeks.

The reports of the treasurer evidencing the amount of money collected by him were usually, perhaps always, made out in the handwriting of the accused and signed by Ferguson.

There were in the office of Ferguson two books, called the ledger and cash book. In the one were inserted the names of those owing back taxes and the amount, also the amount paid by them; and in the other was the amount of cash received at various times from those paying it.

When money was paid tickets were made and placed with the cash in the cash drawer, and the money usually taken from the drawer and deposited in some one of the banks to Ferguson's credit. The safe in which the books were kept, and sometimes the money, as well as the office, was furnished by the city.

The appellant seems to have made the deposits generally, and the money, when required by Ferguson, was checked out on his order to be paid either to the city treasurer or those entitled.

Ferguson was at the Hot Springs from May 20, 1882, until the 10th of June of the same year, and during his absence it appears that one Newman was indebted to the city for taxes on his property for the years 1878, 1879, 1880 and 1881; for the two last years the money was going to the tax receiver of the city and not to the back tax collector. The entire amount of taxes due was paid by one Clemerson, in a single check, and this check delivered to the appellant Snapp, who indorsed it and then delivered it to the clerk of the tax receiver. The bank where it was payable cashed the check, and the tax receiver, or his clerk, retained the amount due him, and paid the balance to the appellant — that balance, \$342.88, belonging to the back tax collector's office. All of this sum Snapp is proven to have accounted for except \$169.45, the amount of Newman's taxes for the year 1879. This sum was not entered on the cash book or accounted for by Ferguson in his settlement with the city treasurer after his return home, nor has the city, so far as this record shows, ever received it.

The same day Snapp received this money (\$342.88) he de-

posited in bank to Ferguson's credit \$550, and claims to have accounted to Ferguson for all the money received by him.

There was a plea of not guilty entered, and the burden was on the commonwealth to show a felonious taking of this money and its conversion by the accused before he could be convicted of larceny.

The failure of either to account to the city for the money did not make either guilty of larceny. Ferguson's duty was to account to the city treasurer, and Snapp's duty was to account to his principal, Ferguson; and while the failure to account showed the one or the other, or both, to have been in default, still it made neither guilty of a felonious taking of the money belonging to the city.

The prosecution was permitted to prove, in order to a conviction, that, during the absence of Ferguson in the south, there had been paid into the office of the back tax collector, at various times (the accused being in charge of it), the sum of \$6,000, and that nearly \$2,000 of that sum had never reached the city treasurer or been accounted for by Ferguson.

The appellant objected to the introduction of this testimony, and his objections were overruled, to which an exception was entered.

The prosecution, after issue formed between the accused and the state, undertook to convict the appellant of larceny in taking the \$342, amount paid him of Clemerson's check in discharge of Newman's tax bill, and the testimony was directed to that specific charge. The issue was then distinctly made, and it devolved on the commonwealth to show *an unlawful taking of this money from the city by the accused with a felonious intent*. Snapp was not an officer of the city, and was under no obligation to account to the city treasurer, nor would the latter have recognized him as the party with whom he was to make these weekly settlements.

It was Snapp's duty to account to Ferguson, and to no one else. The commonwealth had traced the money into the hands of the accused, who had the right to collect it and to pay it over under Ferguson's order. The money was properly paid over to him, and he alone, during Ferguson's absence, had the right to its custody. A conviction could not be had under the indictment for larceny, unless the jury believed from the testi-

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mony that the accused had taken this particular money, or a part of it, from the city of Louisville, with the felonious intent of depriving the city of its use. The money had been received without fraud, and as a matter of right, and in such a case, although he may have the *animus furandi* afterwards and convert it to his own use, he is not guilty of larceny.

There is no testimony in this case showing any felonious taking after the money had been lawfully received by the accused, unless the jury may infer a subsequent felonious taking from the previous conduct and history of the accused. The presumption in favor of the accused is, that he accounted to Ferguson for this money, and this presumption of innocence continues until facts establishing guilt appear, and when a failure to account is shown it does not constitute the crime of larceny. If this money had been deposited with the city treasurer and then abstracted by the accused, he would be guilty of larceny, or, if paid over to Ferguson and by him deposited in his safe in his office, or by the appellant as his clerk, and the latter had then taken it with a felonious intent, he would be guilty of the offense of larceny from Ferguson, but not from the city.

Neither state of case is presented by the facts of this record, and the jury were permitted to infer the commission of the offense from testimony introduced by the prosecution, showing that other sums of money had been unaccounted for by Ferguson that had been collected by Snapp in Ferguson's absence, and although the accused came into possession of the money lawfully, there was a subsequent felonious taking that constituted the offense of larceny. The *corpus delicti* had not been established, but the jury were in effect told, or were permitted by the introduction of this testimony, to convict the accused of the larceny of \$169, not because the offense had been proven, but for the reason that during the period of two months his principal (not the accused) had failed to account to the city of Louisville for near \$2,000.

Where several felonies are parts of the same transaction, evidence of all is admissible on the trial of an indictment for any of them. Russell on Crimes, vol. 3, p. 283.

This rule, however, does not apply to a case like this, where a charge of larceny alleged to have been committed on one day

is attempted to be established by proof of another larceny committed on a different day, although from the same party and under the same employment. Three indictments were pending against the same party for setting fire to three ricks belonging to three different persons. It appears that the ricks were in sight of each other, and were set on fire the one after the other, and it was held that the whole was one continued offense. Or, in an indictment for arson containing five counts for setting fire to five different houses which were all in one row, and the fire from the one communicated to all the others, it was held to be one offense. In this case testimony has been introduced of independent and distinct offenses or appropriations of money for the purpose of showing that a lawful possession has become tortious. Such a ruling cannot be sustained upon principle or by authority. "The facts proven must be strictly relevant," says Russell, "to the particular charge, and have no reference to any conduct of the prisoner unconnected with the charge." For this reason the general character of the accused,—his disposition to commit crime,—cannot be introduced by the prosecution for the purposes of conviction; and if not, we see no reason why, on a trial for larceny where the felonious taking is denied, the fact may be established by proof that the accused committed another larceny about the same time, or a series of such offenses similar in their character. When it becomes necessary to show guilty knowledge, or the intent with which the act was done, such evidence is admissible.

In an indictment for murder, former threats between the parties may be shown to establish malice, or where one is charged with making a fraudulent entry, the fact of the entry alone is not sufficient evidence of fraud, and therefore the intent must be shown by the commonwealth, and it is competent to show other false entries with a view of showing the intent with which the false entry was made. One is charged with passing a counterfeit bill, knowing it to be counterfeit; the *scienter* may be established by showing the passing of similar bills, and his knowledge that they were counterfeit. So, in an indictment for poisoning, proof may be introduced showing that the accused knew it was poison, and its effect, by having administered the same drug to others.

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ing worthless property as valuable, representing that a brass ring is gold; the fact of attempting to pass and disposing of such spurious jewelry to others may be shown to establish the intent or knowledge of the party. "It may be laid down as a general principle, says the learned judge below, supported by reason and authority, that when there is a question whether an act was accidental or intentional, the fact that such act formed a part of similar occurrences, in each of which the person doing the act was concerned, is deemed relevant." Such evidence is admitted for the reason that the intent or *scienter* cannot be established without it; but the rule has never been carried so far as to admit evidence against the accused of an independent larceny, although of the same character, for the purpose of convicting the party of the larceny for which he is being tried. Besides, what does this evidence establish if competent? It shows that Ferguson failed to account to the city for various sums of money while Snapp was his clerk, and some of it, or all of it, collected by Snapp when Ferguson was absent. This is no evidence of a felonious taking by Snapp when the only evidence introduced against him establishing the *corpus* is, that he received the money lawfully. It may be and is evidence conducing to show that one or the other (Ferguson or Snapp) appropriated the money to their own use, but it is not evidence of a subsequent felonious taking of \$342 that makes Snapp guilty of larceny. The *corpus delicti* in this case was not established by the proof that he obtained the money lawfully, because, having obtained it rightfully, if he had expended it the next moment, he is not guilty of larceny.

It is no case for proof as to the unlawful intent; for when established, conceding that he appropriated it to his own use, he is civilly and not criminally responsible.

This proof has gone to the jury not only to show that he intended to dispose of it for his own use when he received it, but to show, in addition, a subsequent felonious taking.

In an indictment for stealing pork, a bowl, some knives, and a loaf of bread, it appeared that the accused entered a shop and ran away with the pork, and in a few minutes returned and placed the pork in a bowl which contained the knives, and took away the whole together, and in half an hour returned

and took the bread; it was held that taking the bread was a distinct offense, and could not be given in evidence under the indictment. "Generally speaking, it is not competent to a prosecutor to prove a man guilty of one felony by proving him guilty of another unconnected felony; but where several felonies are connected together and form part of the entire transaction, the one is evidence to show the character of the other." Russell on Crimes, p. 280.

In this case the failure of Ferguson to account for the moneys paid to Snapp at various times while he was absent, although not shown to be larceny by Snapp or Ferguson, is permitted to go to the jury to establish that a failure to account in a single instance does constitute larceny, or is a fact from which the jury may infer the commission of the particular crime.

In the case of *The State v. Goety & Martin*, 34 Mo., the defendants were indicted for larceny of jewelry from the store of Jaccard in St. Louis. The defense was that the property was taken by their children unknown to them, and that they were of good character.

The state then introduced evidence that on the same day and about the same hour the defendants had stolen articles from the stores of others in the vicinity of Jaccard's store. The evidence was held incompetent, the court saying: "We have been unable to find any reported case in which, upon a trial for larceny, evidence of another and distinct larceny was admitted to establish the one charged in the indictment."

If there was a taking of this money from the city without right or authority, no evidence on the part of the commonwealth of the intent was necessary. If the accused took from the possession of the city, or Ferguson, the money of either and appropriated it to his own use, the law will imply the intent. If he did what is charged, the criminal intent necessary to constitute the offense accompanied the act.

Such an act would be neither innocent nor lawful, but unlawful, and the burden would rest on the accused to excuse himself from the criminal intent that necessarily arises from the commission of such an act. Lord Mansfield says: "When an act in itself indifferent becomes criminal if done with a particular intent, then the intent must be proved and found, but when the

act is unlawful, the defendant, intent."

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act is unlawful the proof of justification or excuse lies with the defendant, and in case of failure then the law implies criminal intent."

The testimony objected to being incompetent, the objections should have been sustained.

It further appears from the indictment and the testimony in support of it, that this alleged larceny was committed on the 8th of June, 1882, and the prosecution was permitted to prove that before the larceny is alleged to have been committed the accused was of extravagant habits,—his mode of living; the expenditure of a much larger sum of money each month or year than his monthly or yearly salary,—all facts transpiring before the commission of the offense.

All this was allowed to show the inducement for the wrongful appropriation of the money. This was clearly incompetent. His habits and mode of life prior to the 8th of June, 1882, had no connection with the commission of the offense with which he stood charged. Such evidence would doubtless be competent in a case where a party was indicted for robbery from the person, or larceny of money or goods, to prove that immediately after the offense the party accused, prior to that time being without money, had in his possession shortly after large sums of money, and was using it lavishly on himself or family. Such a link in the chain of circumstances might be properly introduced, but his extravagant habits prior to the time of the commission of the offense, it seems to us, cannot be admitted under any recognized rule of evidence, and therefore the court erred in permitting it to go to the jury.

After the testimony had been heard on both sides, counsel for appellant asked the court to say to the jury that if the accused had accounted to Ferguson for the money, they should acquit him. If a conviction could have been had on the theory of the prosecution, this instruction, in a modified form, should have been given.

The accused was under no obligation to account to the city, but was compelled to account to Ferguson. If, therefore, he, in good faith, accounted to Ferguson, he was entitled to an acquittal.

There was proof conducing to show that he had accounted for all the money collected by him during Ferguson's absence

but five or six hundred dollars, and the jury might well have concluded that in making the account he had included the amount collected of Newman.

While Ferguson was collecting this money as a public officer for the use of the city, the city was not entitled to the identical money. He had the right to deposit it wherever he saw proper, or to retain it in his own custody, and all the city had the right to demand of Ferguson was to pay over the amount collected by him, and Ferguson had the right to exact an account from his clerk, and it was his duty to make it and to pay to Ferguson the money he, as clerk, had collected.

If the money had been taken from the drawer in Ferguson's office, or the safe, it was a theft from Ferguson, and the latter was liable to the city on his bond for the loss.

This was not the final depository of the city's money kept by its agent or treasurer in the vaults of the city, and who is responsible only for that diligence that a prudent and careful custodian of the money should exercise, and if the burglar should enter and take the money the city must bear the loss, and not the treasurer, when not lost by his neglect. Ferguson was only a tax collector, and no distinction exists between him in this regard and the sheriff or his deputy who collects the county levy and the state revenue. It will not be argued that a sheriff may be indicted for larceny from the state or county when he fails to account for the revenue collected by him, and when collected, if stolen from his possession or from the safe in his office, whether furnished or not by the county or state, he is liable for the loss. The thief steals from the sheriff and not from the state or county; and even if the accused was guilty of larceny, it was a taking from Ferguson and not from the city. Ferguson could not be guilty of larceny by taking the money, and, having the right to its custody, an accounting to him by the accused entitled the latter to an acquittal. Under 24 and 25 Victoria it was provided: "Whoever being the bailee of any chattel, money or valuable security, shall fraudulently convert the same to his own use, shall be guilty of larceny."

Under the statute the prisoner was indicted charged as bailee with stealing the money in his custody belonging to a society. Mills, justice, said: "The prisoner is charged with

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larceny as bailee, but he was the acting treasurer, and as such it was his duty to deposit or invest the money received, and he was not required to pay over the specific coin that came to his hands, which is essential to a bailment. 2 Russell on Crimes, p. 247. This case is cited to show that Ferguson was not a mere bailee, and required to pay over the identical money received by him from the tax payer, and therefore a felonious taking of the money from him or his office is a theft from Ferguson.

In this state we find various statutes enacted with reference to officers of corporations who are intrusted with the custody of funds of the corporation, making them criminally liable for disposing of such funds for their own use. Also enactments making any one guilty of embezzlement who fraudulently misapplies funds belonging to or for the use of the state. Whether the case of a tax collector comes within any of the provisions of these statutes is not necessary to be determined, but it is manifest they were enacted so as to punish those who otherwise, under the rule of the common law, would only be guilty of a breach of trust in using such moneys when under their custody and control.

The jury were the triers of the fact as to the guilt of the accused, but having returned a verdict based on incompetent testimony, it is the duty of this court to reverse the judgment of conviction.

The accused has been convicted of larceny when the money alleged to have been wrongfully appropriated came rightfully into his possession, and when the evidence is excluded that has no relevancy to the issue made there is no case of larceny against him.

Judgment reversed, and cause remanded for proceedings consistent with this opinion.

NOTE.—When evidence of other offenses is admissible. See *Swan v. Commonwealth*, 4 Am. Cr. R., 188, and note; also, *State v. Kepper*, 5 Am. Cr. R., 594.

PEOPLE v. MURPHY.

(101 N. Y., 120.)

EVIDENCE: *Abortion — Privileged communications — After declarations no part of res gestae.*

1. **EVIDENCE — PRIVILEGED COMMUNICATIONS — DECLARATION TO PHYSICIAN.**—Where a physician is sent to a prisoner after a crime has been committed, and she accepts his services professionally, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal.
2. **OPINION DEDUCED FROM PRIVILEGED COMMUNICATIONS.**— The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible.
3. **DECLARATIONS NARRATIVE OF A PAST OCCURRENCE.**— Although the prisoner was a party to the crime (abortion), and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res gestae*, were not admissible.

Horace L. Bennett, for appellant.

Joseph W. Taylor, district attorney, for respondent.

FINCH, J. We are of opinion that section 834 of the Code of Civil Procedure is applicable to criminal actions, and that whatever possible doubt may have attended the question is fairly dispelled by section 392 of the Code of Criminal Procedure. The confidential character of disclosures by a patient to his attending physician was established before the code by statute, and in terms which, beyond reasonable question, applied to all actions, whether civil or criminal. 3 R. S. (6th ed.), 671, § 119; *People v. Stout*, 3 Park. Crim. R., 670. That statute was substantially incorporated into the Civil Code in language broad enough to justify the same general application as that which characterized the older statute; and the further provision of the Code of Criminal Procedure already referred to seems to us intended to settle the question. No doubt upon that subject was intimated in *Pierson v. People*, 79 N. Y., 424; but in that decision the statute was construed, and we held it did not cover a case where it was invoked solely for the protection of a criminal, and not at all for the benefit of the patient, and where the latter was dead, so that an express waiver of the privilege had become impossible. The present

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is a different case. Here the patient was living, and the disclosure which tended to convict the prisoner inevitably tended to convict her of a crime, or cast discredit and disgrace upon her. We have no doubt upon the evidence that between her and the witness whose disclosure was resisted there was established the relation of physician and patient. Although he was selected by the public prosecutor and sent by him, yet she accepted his services in his professional character, and he rendered them in the same character. She was at liberty to refuse, and might have declined his assistance; but when she accepted it she had a right to deem him her physician, and treat him accordingly. It follows that the exception to his disclosure of what he learned while thus in professional attendance was well taken.

But if his evidence had been admissible as being competent, another error was committed. He was sent to the patient after the crime was complete, when the abortion had been accomplished, and the patient was merely suffering the physical consequences of the act. Although she herself was a party to that crime, and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations narrative of a past occurrence, and constituting no part of the *res gestæ*, were not admissible. These declarations were excluded by the court upon the objection of the accused, and properly excluded; but, notwithstanding, the attending physician was allowed to express his opinion as a medical expert that an abortion had been produced, founding that opinion not only upon what he observed of the physical condition of the woman, but upon all her statements, and upon the history of the case as derived from her. The opinion of the general term concedes the error of such evidence, but insists that the opinion was founded upon her statements merely of the "locality of the pain, the condition of the injured parts, and so on." We understand what occurred differently. When the witness was first asked his opinion whether the birth occurred from natural or artificial causes, he inquired whether, in giving his answer, he would be allowed to consider the clinical history of the case as he got it from the girl's statement, to which the prosecutor replied: "Certainly; I ask the question upon the whole history of the case, as you learned it from her, as well

as from the examination." To this the prisoner objected. The court did not at once pass on the objection, but suggested that the physician answer first from his observation alone. He did so answer, and said: "From my physical examination of the woman and the foetus it would lead me to believe that an abortion had been induced;" and then added, as a reason, that natural miscarriages were not likely to occur at that stage of pregnancy with the frequency of earlier stages. How weak this evidence was upon the vital point whether the miscarriage arose from natural or artificial causes was made apparent on the cross-examination, where, in answer to the distinct question "whether or not, from such physical examination as you describe you made there, is it possible, as a matter of medical knowledge, science, and experience, to say that a miscarriage had been produced," the witness felt constrained to answer, "No, sir."

The prosecutor, apparently feeling the need of adding some decisive force to the opinion, followed his first inquiry with this question: "On the personal examination that you made of the woman and the foetus, and the history of the case as you got it from her, what do you say now as to whether or not there had been an abortion, brought about by artificial means?" To this question the prisoner's counsel objected, as calling for hearsay and a privileged communication, and on the further ground that it involved "the history of the case," which had not been disclosed. The district attorney offered to disclose it, and put the question, "what the girl said," which was objected to and excluded. Thereupon the court overruled the objection, and the witness answered: "I say an abortion had been produced." It is not possible on this state of facts to say justly that by the history of the case and the girl's statement was meant only her complaints of present pain and suffering. Nothing of the kind was suggested, or pretended, or could have been understood, by court or witness or jury. Indeed, on cross-examination, the witness described what he meant by the "clinical history of the case," saying: "I wrote down part of her statement, and testified to it in the police court, and that included how she came there, and what happened since she came to that house." So that the opinion of the expert that a crime had been committed, founded upon the narrative of the woman

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of previous facts, which narrative was itself inadmissible, and remained undisclosed, was given to the jury. Necessarily it carried with it damaging inferences of what that narrative in fact was, and drove the accused to the alternative of omitting all cross-examination as to the concealed basis of the opinion, or admitting inadmissible evidence.

We think there was error for which the judgment should be reversed, and a new trial granted, and the proceedings remitted to the court of sessions of Monroe county for that purpose.

Judgment reversed.

(All concur.)

SMITH v. THE STATE.

(64 Md., 25.)

EVIDENCE: *Cross-examination.*

QUESTIONS TENDING TO DEGRADE WITNESS, HOW FAR ADMISSIBLE.—In a trial for murder, a witness for defense was asked on cross-examination this question: "State if you have ever been confined in Baltimore city jail?" The counsel for the prisoner objected, but the court overruled the objection and allowed the question. But the court instructed the witness that she is not obliged to answer the question, and she thereupon refused to answer. *Held:*

1st. That in notifying the witness that she was not obliged to answer the court was as liberal to her and to the accused as any recognized rule could require.

2d. That there was no error in allowing the question to be put.

Appeal from the Circuit Court for Howard County.

The cause was submitted to Alvey, C. J., Yellott, Stone, Robinson, Irving, Ritchie and Bryan, JJ.

Edwin Linthicum, Sydney Hall and Thomas C. Ruddell, for the appellant.

Jos. D. Maguire and Charles B. Roberts, attorney-general, for the appellee.

IRVING, J., delivered the opinion of the court.

Upon the trial of this appellant for murder, a witness for the defense was asked on cross-examination this question: "State if you have ever been confined in the Baltimore city jail?" The counsel for the prisoner objected, but the court

overruled the objection, and allowed the question; but the court instructed the witness that she was not obliged to answer the question. The witness did refuse to answer, and the counsel for the defense excepted because the question was allowed to be put. Whether the circuit court was right in so ruling is the sole question for our decision.

The subject has been much discussed in the books, and many conflicting decisions have been made; and many judges have gone further than the court did in this instance, and have required an answer unless it was made clearly to appear that the answer would subject the party to danger of prosecution, or be a possible link in the evidence against him. The theory upon which such inquiry has been allowed is, that the credibility of a witness is always in issue, and therefore anything which will tend to throw light upon his character in that regard may always be inquired into. In *Cundell v. Pratt*, 1 Moody & Malkin, 108, Best, C. J., said he should always "protect witnesses from questions the answers to which would expose them to punishment; but if they were protected beyond this, from questions that tended to degrade them, many an innocent man would unjustly suffer." In *Real v. The People*, 42 N. Y., 270, the court said their conclusion was "that a witness upon cross-examination may be asked whether he has been in jail, the penitentiary or the state prison, or any other place that would tend to impair his credibility, and how much of his life he had passed in such places. When the inquiry is confined as to whether he has been convicted, and of what, a different rule may perhaps apply. This involves questions as to the jurisdiction and proceedings of a court of which the witness may not be competent to speak." The court added that this latter was the point involved in *Griswold v. Newcomb*, 24 N. Y., 298, which was relied on by the appellant here. It is thus distinguished in principle, and does not apply to this case. In *Real v. The People*, the court said, "the extent of the cross-examination of this character is somewhat in the discretion of the court, and must necessarily be so to prevent abuse." If this were not so, the whole range of a man's life might be traversed, and the possibility of reformation and restoration to respectability and credibility would be excluded. If the witness desires protection from an unwarrantably prejudicial in-

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ference from the fact inquired about, he can explain; and even if it be a conviction in another state, put in evidence to affect his credibility, he may explain the circumstances of that conviction. Wharton, Cr. Ev., sec. 474, and note, and secs. 489 and 596. In section 474 it is said, "the tendency now is, if the question be given for the purpose of honestly discrediting, to require an answer." In the leading case of *Frost v. Holloway*, cited by Wharton, in section 474, Lord Ellenborough compelled an answer to a question whether the witness "had been confined in jail for theft." The only question before us is whether the question may be asked, and not whether answer may be compelled, and we have only referred to that case to show how much further some courts have gone than was done in this case. There are two cases in 4 Espinasse, N. P. C., which countenance the exclusion of the question. *Rex v. Lewis*, 225, and *Macbride v. Macbride*, 242; but they do not seem to have been much followed; and Mr. Phillips, in the first volume of his work on Evidence, pages 282 and 283 (4 Am. ed. from 7th Eng. ed.), says there are very many other cases wherein such questions have been allowed; and in the note on the pages cited, the cases of *Rex v. Lewis* and *Macbride v. Macbride* are commented on, as being cases where the witness was protected from danger and unnecessary degradation only. Whether this was so or not, the current of decision is the other way, and the same author says, "the common practice of courts before most approved judges will abundantly furnish instances of such questions being asked, and not being disallowed as contrary to rules of law; and it is difficult to see how such a question can be properly deemed illegal, when, if the witness chooses to answer, his answer must undoubtedly be received as evidence."

Mr. Roscoe, in his Digest of Evidence at Nisi Prius (12th English ed.), 174, says the weight of authority allows such questions to be put, and adds that "the preponderance of opinion is in favor of the position that the judge is to exercise his discretion whether he will grant the privilege (of declining to answer) upon the bare claim of the witness, or will investigate the claim by further inquiry." The witness is clearly entitled to protection, if asked for by him, and the court thinks he is endangered or will be unnecessarily degraded. In Green-

leaf on Ev., sec. 451, this view is maintained, and the same general view runs through all the text-books. In notifying the witness in this case that she was not obliged to answer, the court was as liberal to the witness and to the appellant as any recognized rule could require. There was certainly no error in allowing the question put.

Rulings affirmed and cause remanded.

CRITTENDEN V. THE COMMONWEALTH.

(82 Ky., 164.)

EVIDENCE: *Cross-examination.*

1. **NO CROSS-EXAMINATION AS TO COLLATERAL FACT.**—It is not competent to cross-examine a witness as to any distinct collateral fact not brought out in the examination-in-chief, with the view of impeaching his testimony by introducing other witnesses to contradict him.
2. **SAME.**—If a question as to such collateral fact be put to a witness with the intent to discredit his evidence, his answer must be taken as conclusive. No evidence can be adduced afterwards to contradict it.

Isaac Caldwell, M. Munday, Kinney, and Muir & Hayman,
for appellant.

P. W. Hardin, attorney-general, and *A. G. Caruth,* common-
wealth's attorney, for appellee.

Chief Justice HAROLD delivered the opinion of the court.

On the 13th of December, 1882, the appellant, Thos. Crittenden, was arrested and tried for a breach of the peace, the deceased, Rose Mosby, a colored boy about nineteen years old, then employed as dining-room servant by appellant's father, being a witness against him. At the trial Mosby testified that Young, with whom appellant had the altercation, did not call the latter a white son of a b—h. Crittenden thereupon said: "I will see you later," or "I will see you this evening."

After the trial was over the parties separated and returned to their respective places near Anchorage depot, Mosby stopping at the house of Ellen Barnett, a colored woman. Crittenden went to the depot and there received an express package for his father and carried it to his house, where Harry

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and Burnley, his brothers, were awaiting dinner. The dining-room was upstairs and the kitchen below.

Susan Johnson, who was introduced as a witness by the appellant, testified, on direct examination, that when he came back from Middletown (where the trial had taken place) he came into the kitchen "and asked for Rose — if he had come. I said no, and he asked me how long it would be before dinner, and I said as soon as Rose came. He went upstairs and came down and asked if Rose had come. Then he came back again and asked me if Rose had come. And then he said to have the dinner, that Harry would set the table." She said nothing about Crittenden being in a good humor or making any threats. On cross-examination she said: "When I was carrying the soup up I had on Rose's apron. I said Mr. Thomas came out of the room when I came up the steps. I did not know whether he was going to the dining-room or going out. He ran against me, and he said: 'Is that you, Rose?' and I said 'Yes.' He said 'excuse me.' She was then asked if, while the Crittendens were awaiting dinner, she did not go over "to Ellen Barnett's and take Rose Mosby out and tell him not to come back to Crittenden's, that he would be killed." She answered: "No, sir; I did not think he would be killed. I did not know."

She was then asked: "Were you not, when you went there, in an alarmed and disturbed condition, and did not you go there to warn him not to come there?" Her answer was: "I don't know whether I was disturbed or not. After he said he was not coming, I just told him not to come."

She was asked substantially the same questions as to an alleged conversation with Nichols, in which she was supposed to have related what passed between her and Rose Mosby at Ellen Barnett's. Her answer was: "I don't know whether I told Henry (Nichols) that or not."

The commonwealth, against appellant's objections, was then allowed to prove by Henry Nichols, "that she said she told Rose not to come there; that Mr. Tommy was looking for him and looked mad, and she thought he would be hurt." "That Mr. Crittenden had come down twice to look for him. He came into the room where she was looking for Rose, and he looked mad, and she got excited and ran up to Mrs. Bar-

nett's to tell him not to come there." And also by Ellen Barnett, that "she said she had told Rose not to come down there; that Mr. Tommy would shoot him."

This testimony was illegal, because it was an effort substantially, and in effect, as said by this court in *Champ's Case*, 2 Met., 24, to show that the witness had stated, out of court, facts which she failed to prove in court, and thus to transform the hearsay testimony of Nichols and Barnett into substantive evidence which did not have the oath of Susan Johnson to support it, for she denied the occurrences as shaped by the questions put to her, and also swore that she had not had the alleged conversations with Nichols and Barnett, who knew nothing personally of the existence of the supposed facts.

Section 597, Civil Code, provides that "a witness may be impeached by the party against whom he is produced . . . by showing that he has made statements different from his present testimony." But the question here, on this point, is whether the alleged statements of Susan Johnson are different from her testimony. There is no necessary conflict between anything she said on the examination in chief and the statements attributed to her by Nichols and Barnett. If there be any conflict or difference, it was drawn out by the cross-examination, and this should never be allowed for the sole purpose of contradicting the witness by statements made elsewhere. "A witness is not to be cross-examined as to any distinct collateral fact for the purpose of afterward impeaching his testimony by contradicting him." Starkie on Ev., 200; *Kennedy v. Commonwealth*, 14 Bush, 357.

Instead of differing from the tendency of her evidence they rather accorded with it, and what she did was simply not to testify to substantive facts which she was supposed to know. She failed to state in court facts which, it is said, she admitted out of court, and it was illegal to supply the omission by hearsay testimony. This view is clearly sustained by the authority cited.

There is another phase of this alleged contradictory evidence which renders it objectionable. It is this: Nichols was permitted to testify that she told him that she told Mosby "she thought he would be hurt; that Mr. Crittenden had come down twice to look for him." Her inference from the facts,

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as she stated them, does not necessarily follow, because Mosby was the dining-room boy, and by her testimony she shows that she was delaying dinner for Mosby to come and set the table, and that Crittenden finally said "to have the dinner, that Harry would *set the table*." It was for the jury to determine from the facts she detailed, and not from what she thought, whether Crittenden intended to kill Mosby, or was impatient for his dinner, and certainly the appellant's acts and words, and not her thoughts, furnished the medium for ascertaining his motives and purposes. *Commonwealth v. Mooney*, 110 Mass., 99; *Kennedy's Case*, 14 Bush, 358; 15 B. Mon., 539.

In the case of *Loving v. Commonwealth*, 80 Ky., 507, the doctrine of the cases of Kennedy and Champ is recognized and applied.

It is claimed by counsel for the commonwealth that the evidence of Nichols and Ellen Barnett did not prejudice the substantial rights of appellant; first, because the appellant is clearly guilty, and second, he was only convicted of manslaughter. As to the first reason, it may be said that the court does not try the fact of the guilt or innocence of the prisoner; that is for the jury, and the jury alone. And all men are entitled to a fair and legal trial, and we know of no exception to this rule. It is true that the verdict of the jury finding the appellant guilty of manslaughter excludes the idea that they believed he did the killing maliciously, but it does not follow for that reason that the appellant's substantial rights were not prejudiced by this evidence, for the question whether the killing was malicious was not the only issue in the case. The appellant's plea of not guilty controverted the malice necessary to constitute murder, and presented the claim of self-defense, which, if true, entitled him to an acquittal of the homicide in any degree. It will not do, therefore, to say this evidence was not prejudicial, for that would be to assume that it had no bearing upon the plea of self-defense, which we cannot concede. About the time Crittenden left the house after he ate his dinner, Mosby came into the kitchen and began eating, and when asked by Susan Johnson why he did not sit down and eat his dinner as he ought to, "he said that he had not time; that Mr. Thomas wanted to see him and he wanted to see Mr. Thomas," and then went out. Shortly afterwards,

at the depot, Crittenden met him and said: "Are you going over to the house and wash the dishes?" Mosby replied: "No; I don't think I will go there any more," and Crittenden said, "very well," or "you won't?" "very well," and went back to the house. Just after he left, Mosby picked up a rock and put it in his pocket. Crittenden was at the house some minutes, got his gun, loaded it with *bird-shot*, saying he was going hunting, there having been some blackbirds seen in the neighborhood shortly before that time. He passed out of the back way, and as he went towards the stable, his brother says he told him to pay the expressage which Crittenden said he had forgot but would do so, and went on to the stable, where he staid about five minutes; then he went to the west end of the depot, the route he took being much further than the usual way, got on the platform which led to the express office, and according to the commonwealth's witnesses who were friendly to Mosby, walked down until near to Mosby, presented his gun, said "you son of a b—h, you swore a d—n lie against me in court," and shot him in the left breast. Mosby turned and Crittenden shot him under and between the right shoulder and spinal column. Mosby staggered twenty or thirty feet and fell dead, or died soon after his fall. Burnley Crittenden testified that he came in a few moments, took the gun from appellant and unloaded it. He said when he got there, there was a large rock in Mosby's hand. The commonwealth claimed that Mosby had only one rock, and it was in his pocket, introducing several witnesses who testified that they saw no rock in or near Mosby's hand after he fell, and that none was on the platform. Whether Burnley Crittenden was to be believed was for the jury to decide. The theory of the defense is, that Butler Nichols and Heath were members of a secret order to which Mosby belonged, and they were at or near the depot to sustain the latter in the contemplated assault on Crittenden; that they were consequently hostile witnesses; that Mosby had armed himself with rocks, and when Crittenden came up he drew the larger rock to throw at the latter, and was shot in the act; that Mosby went to the house, after he had been at Barnett's, showing no fear of Crittenden, but hurrying through eating so he could find him, as he said he wished to see him; and that this evidence showed that the alleged statements of

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Susan Johnson, if made to him, had no influence on him, and could not have been as alarming as Nichols and Barnett would prove them to be by her conversations.

It is plain, therefore, that there was evidence, if true, tending to establish self-defense, whose force we refrain from discussing, for its weight and credibility belong to the triers of the fact; and the conversations with Susan Johnson, testified to by Nichols and Barnett, tended strongly to show that the alleged self-defense was a pretense, and the circumstances of loading the gun with bird-shot, going the farthest way to the depot, and, as if on a hunt, stopping to pay expressage, and the presence of the larger rock in Mosby's hand after he fell, were false appearances in part and perjury as to the rest, to excuse an otherwise wilful murder. The alleged conversations of Susan Johnson, if believed, would naturally have impressed the jury that Crittenden was searching for Mosby in the kitchen every few minutes before dinner to kill him, and that his trips to the depot were for the same purpose, and tended to convince them that his plea of self-defense was a sham.

It is not the duty of this court to speculate on the force of such important evidence and its weight with the jury, for it must have been prejudicial to his substantial rights. To do so would be to hazard a conflict of opinion between court and jury on the weight of illegal evidence, which, being sanctified by the court's admission as proof, may have had an important influence with the jury. 3 Bush, 352.

The discussion of the facts has been indulged solely to show the importance of the error in admitting the evidence of Nichols and Ellen Barnett as to conversations with Susan Johnson, and not to indicate our belief as to the truth or falsehood of any of the evidence or theories on either side.

Wherefore the judgment is reversed, and the cause remanded with directions to grant appellant a new trial.

OWEN V. THE STATE.

(78 Ala., 423.)

EVIDENCE: *Confessions — Communications between husband and wife.*

1. **CONFESSIONS — ADMISSIBILITY OF.**— Before confessions can go to the jury as evidence in a criminal case, it must be shown to the satisfaction of the court that they were made voluntarily. Any words spoken in the hearing of the defendant while in custody, which might generate hope or fear on his part, are sufficient to exclude his confessions thereby induced; and when a confession has been thus improperly obtained, any subsequent repetition of it must also be excluded, unless it is affirmatively shown that the effect of the improper influence had been entirely removed. Under these rules, as applied to the facts shown in this case, the defendant's confessions ought not to have been admitted.
2. **HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER.**— On principles of public policy, all communications between husband and wife which do not upon their face appear to be public, or intended to be so, are shielded from public scrutiny as evidence, and neither can testify as to such communications when the interests of the other are involved; and in criminal cases, the subsequent dissolution of the marriage relation, by decree of divorce, does not affect the principle nor remove the incompetency.

From the Circuit Court of Lawrence. Tried before the Hon. H. C. Speake.

W. P. Chitwood and *Jas. Jackson*, for appellant.
Thos. N. McClellan, attorney-general, and *Thos. M. Peters*,
contra.

STONE, C. J. The rule is clearly settled in Alabama, as elsewhere, that confessions cannot be given in evidence against a person charged with crime, until they are first shown to the satisfaction of the court to have been voluntarily made. Any, the slightest, menace, or threat, or any hope engendered or encouraged that the prisoner's case will be lightened, meliorated, or more favorably dealt with, if he will confess — either of these is enough to exclude the confession thereby superinduced. Any words spoken in the hearing of the prisoner, which may, in their nature, generate such fear or hope, render it not only proper but necessary that confessions made within a reasonable time afterwards shall be excluded, unless it is shown by clear and full proof that the confession was volun-

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tarily made, after all trace of hope or fear had been fully withdrawn or explained away, and the mind of the prisoner made as free from bias and intimidation as if no attempt had ever been made to obtain such confessions. And when a confession has been once obtained after appliances of hope or fear, any subsequent confession must alike be excluded, until the prisoner's mind is fully and clearly disabused in the manner suggested above, and until it is fairly explained to him that the confession previously made cannot harm him, nor be given in evidence against him. Less than an entire obliteration of all ground of hope or fear previously engendered will not meet the severe requirements of the law; and trial judges could not well be too strict in the enforcement of this rule. We need not elaborate this doctrine. It has been so fully declared that further comment is unnecessary. *Porter v. The State*, 55 Ala., 95; *Brister v. The State*, 26 Ala., 107; 2 Lead. Cr. Cas., 113; *Redd v. The State*, 69 Ala., 255; *Kelly v. The State*, 72 Ala., 244; 1 Greenl. Ev., sec. 214. Under these rules all the confessions of the prisoner proved against him were improperly admitted.

Between the time of the alleged commission of the offense and the trial in the circuit court, the prisoner and his wife, Celia Owen, were divorced, the one from the other. She was offered as a witness against defendant; her competency was objected to, the objections overruled, and she was allowed to testify. Her testimony did not disclose any conversations she had had with the prisoner, nor any declarations made by him. It related to conduct of the prisoner on the night of the alleged burglary, and afterwards, all during the time they were living together as husband and wife. Some of her statements relate to conduct of his, which would not likely have come to her knowledge in its details if they had not been husband and wife. As to other portions of her statements, they came to her knowledge merely by the circumstance of her presence, and do not appear to have resulted from the relation she sustained to him, farther than that relation caused or contributed to her presence at the time and place of their occurrence.

There is a well defined rule of law, that any transaction or communication between husband and wife, which does not on

its face appear to have been intended to be public, or to become so, is shielded by the sacredness of the relation from the public eye; and neither is a competent witness to testify as to such transaction or communication when the interests of the other are involved. This rule rests on the ground of public policy, and stands unchanged, even after the marriage relation is dissolved by the death of one of the parties, or by judicial sentence. When, however, the conduct or transaction is in no sense traceable to their relation of husband and wife and the confidence it inspires, but in its nature is as likely to have occurred before the public as in private, there are authorities which hold that, after the marriage is dissolved, the parties, or survivor, as the case may be, are competent, in civil cases, to testify for and against each other. *Beveridge v. Minter*, 1 Car. & P., 364; *S. C.*, 11 Eng. C. L., 421; *Edgell v. Bennett*, 7 Vt. 534; *Wottrich v. Freeman*, 71 N. Y., 601; *Coffin v. Jones*, 13 Pick., 441; *Putton v. Wilson*, 2 Lea (Tenn.), 101, 112; *Stanford v. Murphy*, 63 Ga., 410; *Brown v. Wood* (on statute), 121 Mass., 137; *Westerman v. Westerman* (on statute), 25 Ohio St., 500. See, also, *Aveson v. Ld. Kinnard*, 6 East, 132; *Raynes v. Bennett*, 114 Mass., 434.

The following cases are variant from the foregoing: *Stein v. Bowman*, 13 Pet., 209; *Robin v. King*, 2 Leigh, 140; *Terry v. Belcher*, Bailey (S. C.), 568; *Barnes v. Camack*, 1 Barb., 392; *Succession of Anne*, 33 La. An., 1317; *Doker v. Hasler*, Ryan & Moody, 198; *S. C.*, 21 Eng. C. L., 416. Consult, also, the following authorities: *Woods v. State*, 76 Ala., 35; 1 Greenl. Ev., secs. 254, 334, 335, 337; Whart. Cr. Ev., sec. 400. This rule, as applicable to civil cases, is laid down in *Gordon v. Tweedy*, 71 Ala., 202.

In the case of *The State v. Jolly*, 3 Dev. & Bat. Law, 110, the doctrine was considered in reference to a state prosecution; and it was held that the husband, though divorced from his wife, was incompetent to prove criminal conduct on the wife's part. No question of confidence, growing out of the marriage relation, appears to have been presented in that case. It was rested on general principles of public policy.

In favor of the North Carolina decision, and of the doctrine of absolute exclusion in state prosecutions, we can well imagine that very embarrassing questions might arise on cross-examina-

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tion, which would necessarily result in eliciting only garbled statements of fact, or of tearing away the veil which hides from public gaze the sacred confidences which subsist between husband and wife. The testimony should not have been admitted.

Reversed and remanded.

THE STATE v. McCracken.

(88 Ia., 569.)

EVIDENCE: *Identity—Rebuttal—Instruction—Alibi—Declarations of accused—Res gestæ.*

1. IDENTITY—EVIDENCE—INSTRUCTION.—Evidence of non-identity should be treated like any other evidence offered by defendant for the purpose of showing that he was not guilty, it being merely evidence in rebuttal.
2. ALIBI.—The burden of proof is on defendant to establish an *alibi* by a preponderance of the evidence.
3. DECLARATIONS OF ACCUSED—RES GESTÆ.—Declarations made by the accused on his return to his home, as to where he had been, held inadmissible as part of the *res gestæ*.

Appeal from Marshall District Court.

The defendant was convicted upon a charge of stealing a horse from one Buchanan in Marshall county, and sentenced to imprisonment in the penitentiary for two years. He appeals.

J. H. Bradley, for appellant.

Smith McPherson, attorney-general, for the state.

ADAMS, J. 1. The state relied principally upon evidence tending to show that the defendant was seen in the possession of the stolen horse the next morning after he was stolen. To rebut the evidence of the state, the defendant introduced evidence tending to show that on the night of the theft he was several miles distant from the place of the theft, and also that at that time his personal appearance in respect to having a mustache, etc., differed from that of the person seen in possession of the stolen horse. As touching the evidence of non-identity and *alibi*, the court gave an instruction in these words: "While it is necessary for the state to prove the material alle-

gations of fact of the indictment beyond a reasonable doubt, yet, in the establishment of affirmative facts on the part of the defendant, such as facts pertaining to the personal appearance or identity of defendant, or whether he was or could have been at the time when and place where the offense was committed, if it was committed, it is sufficient if such facts are shown by a preponderance of the evidence, which is deemed by the jury reliable and credible, and of any weight; and so considering such fact, with all the other facts and circumstances in the case, if there is reasonable doubt of the defendant's guilt he should be acquitted." The giving of this instruction is assigned as error.

We are not certain that we have a correct understanding of this instruction. But we think that we may say that the court regarded the non-identity of the defendant with the real thief, or with the person seen in possession of the stolen property, under such circumstances as to be presumptively the thief, to be a fact available to the defendant to some extent, if shown by a preponderance of evidence, and otherwise not; and that, if thus shown, it might be considered in connection with other facts and circumstances, and if sufficient, when thus considered, to raise a reasonable doubt of guilt, the defendant should be acquitted. But in our opinion evidence of non-identity should be treated like any other evidence offered by the defendant for the purpose of showing that he did not steal the horse. It was merely evidence in rebuttal. It might have the effect to raise a reasonable doubt of guilt, though not preponderating over that offered by the state. We may say, also, that though preponderating, it might not have the effect to raise a reasonable doubt of guilt, if offered simply upon the question as to the identity of the defendant and the person seen in possession of the horse. The jury might believe that the defendant was not the person seen in possession, and still convict, if other evidence in the case warranted a conviction. It appears to us, therefore, that so far as the question of identity was concerned, the instruction in regard to a preponderance of evidence had no proper place, and could serve only to confuse and mislead.

As to the matter of *alibi*, it may be conceded that under *State v. Hamilton*, 57 Iowa, 596, the evidence should preponderate. But conceding this, we have still to say that we do not think that the instruction given in reference to *alibi* can be

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sustained. If the jury should regard the evidence of *alibi* as preponderating, their belief would be that the defendant was where he could not have committed the crime, and having reached that conclusion, an acquittal should follow of course. The instruction proceeded upon the theory, as we understand it, that the established fact of *alibi* (if it were established) would be a fact to be considered in connection with other facts and circumstances. We think that the instruction in this respect was calculated to confuse and mislead.

2. There was evidence tending to show that the defendant came into possession of the stolen horse, and traded it the next morning after it was stolen to one Milligan for a gray mare, and afterwards traded the mare to one Miller for a pony, and afterwards sold the pony; that the persons with whom he traded were all strangers to him; that the trades were made in different parts of the county, and all within the space of about one week. The possession of the Miller pony was proven by undisputed evidence. The court, in instruction 8, told the jury, in substance, that the possession and sale of the Miller pony might be considered as a circumstance in connection with the other circumstances, and so far the instruction is not complained of. But in the same instruction the court proceeded to say: "If you believe that the explanation of the defendant's possession of the pony, if he made such explanation, to the witness Stultz, reasonable or probable or true, then defendant's possession of the pony, if he had such possession, can have very little, if any, weight in the case." Stultz had testified that the defendant told him that he purchased the pony of a man near Union for \$15. The defendant contends that if this explanation was true, then his possession of the pony was not a circumstance against him, and should have no weight, either alone or in connection with any other circumstance in the case. And he contends that the instruction carried an implication that though the explanation were true, the circumstances might have a little weight against him. To this we have to say that we find no evidence tending to show that the explanation was true; and so far as the instruction assumed that there was, it was too favorable for the defendant. We see nothing in this of which the defendant can properly complain.

3. For the purpose of proving an *alibi*, the defendant offered

to produce by a witness what the defendant at a certain time said as to where he had been. The court excluded the evidence as hearsay. The defendant contends that it was proper, because it was a statement made by the defendant upon his return to his place of residence, and was, therefore, a part of the *res gestæ*. But in our opinion it would be going too far to hold it such. The defendant cites 1 Greenl. Ev., § 108, in which it is said in substance that when a person leaves home or returns, his declaration made at the time and expressive of the character, motive or object of the act, is admissible as evidence. But the declaration in this case was a mere statement of a past event. It was offered to prove something antecedent to his return, and in no way pertaining to the character, motive or object of his return.

For error in giving the instruction first above set out, the judgment must be reversed.

PEOPLE V. WALLIN.

(55 Mich., 497.)

EVIDENCE: Robbery — Instructions — Theory of case — Credibility of witnesses — Co-defendant as witness — Court not bound to comment on facts.

1. **EVIDENCE — IDENTITY.**— A witness who has testified that he thought the man he saw at a certain place was defendant may be asked on cross-examination if there was any doubt existing in his mind that the man seen was defendant.
2. **POINTING OUT ACCUSED.**— Evidence that a party robbed pointed out defendant, and said to a witness that he was one of the men who robbed him, held of no importance, and its admission not error.
3. **FAILURE OF ACCUSED TO ASSIST IN ARRESTING GUILTY PARTY.**— A defendant in whose saloon a robbery has occurred, and who is alleged to have been concerned therein, may be asked, when a witness in his own behalf, if he assisted the officer in arresting the guilty party.
4. **INSTRUCTIONS — EXCEPTIONS.**— Where an instruction to the jury appears misleading, the attention of the court should be called to it at the time in order to give him an opportunity to correct any inaccuracy.
5. **CREDIBILITY OF WITNESSES FOR JURY.**— The force of a witness' testimony depends upon the credit the jury think it entitled to, and no court has a right to lay down for a jury rules whereby they shall determine the force of evidence, irrespective of the credence they actually give it in their minds.

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6. INSTRUCTION — CO-DEFENDANT AS WITNESS.— An instruction as to the credibility as a witness of a co-defendant who has pleaded guilty, that when the law permits persons to testify as witnesses it assumes that they may tell the truth, and whether they have done so or not is for the jury to say, under all the circumstances appearing before them, *held* proper.¹
7. COURT NOT OBLIGED TO COMMENT ON FACTS.— The judge, in instructing the jury, is under no obligation to comment upon the facts, but may confine himself to laying down such rules of law as must guide the action of the jury, and leave the facts to them without a word of comment.

Exceptions before judgment to Saginaw.

Attorney-General Van Riper, for the people.

Camp & Brooks and Wisner & Draper, for respondent.

COOLEY, C. J. Wallin and Isdell were informed against for the robbery of one Rutan of a sum of money. The robbery was alleged to have taken place in the saloon of defendant Wallin, in East Saginaw, late in the evening of November 1, 1883. Isdell pleaded guilty to the information, and Wallin was tried separately. Rutan, it appears, accompanied by one Burras, had gone to East Saginaw on the day of the robbery to transact business at the United States land office. After concluding the business the two had a lunch at a restaurant, and Rutan drank beer more than once in the course of the afternoon. At 6 o'clock Burras took the cars of the Detroit & Bay City Railroad Company for home. Rutan remained, intending to take the train of the Jackson, Lansing & Saginaw Railroad, going north on the west side of the river at 9 o'clock the same evening. He crossed the river to take that train, but was late in reaching the station, and the train was gone. He recrossed the river to East Saginaw, and entered Wallin's saloon. Rutan's evidence is that he entered no other saloon previous to entering Wallin's after his return from the west side of the river; but the defense put in testimony that he drank beer at Wallin's early in the evening, and also that he was in a place kept by one Stabback, where he both drank and played cards until he left to take the cars. It is agreed on all sides, however, that Rutan was in Wallin's after 9 o'clock on his return from the station. Rutan testifies that when he found he was late for the cars he went into

¹ See note.

Wallin's to inquire for some place to pass the night. He found Isdell behind the bar, and asked him about lodgings. Isdell told him they did not keep lodgers, but he would show him where he could find lodgings. Isdell proposed that they should throw dice for the drinks before going, to which Rutan assented. Another man was standing there, who Rutan was satisfied was Wallin. Isdell introduced Rutan to him as a lumberman, and they shook hands together, and then the three threw dice together. After the game was finished they all drank. Rutan then turned around and put his left hand upon the screens standing near, when Wallin caught hold of his arm and said, "You are not going to get away in this way," or something to that effect. Rutan made excuse that he wanted to go to the water-closet at the other end of the room, and started to go there. Just as he reached the water-closet Wallin caught hold of both his arms near the elbow, while Isdell threw his hand around his neck, put one hand over his mouth, took his pocket-book from his pocket with the other, took out the money and then put back the pocket-book. Wallin was holding him all the time. After all this occurred they let him go from the saloon. He was greatly in fear, and ran off as fast as he could until he met a policeman, to whom he told the story. Rutan, while he and the others were shaking dice in the saloon, noticed another man come in, but the two who shook dice with him were the men who robbed him.

The defense did not contest the fact of the robbery, nor of Isdell's connection with it; but their theory of the case was that the other guilty party was one Howard. The question of fact on the trial, therefore, resolved itself into a question of identity; the prosecution contending that Wallin was the associate of Isdell in the robbery, while the defense insisted it was Howard. Rutan's evidence, fixing the crime upon Wallin, was corroborated by one Tilloch, a policeman, who testified to seeing Isdell, Rutan and another, who he believed to be Wallin, throwing dice together, and also by Isdell, who swore positively that Wallin was the person who held Rutan while the witness robbed him. On the other hand, Wallin testified that he had been lying down and asleep in a back dining-room until near 11 o'clock, which was after the hour of the robbery. When he got up and went into the saloon Isdell and Howard were there, but both soon went out. Rutan afterwards came into the

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saloon with a policeman, and said it was there he had been robbed. This testimony as to his whereabouts the fore part of the evening was corroborated by other witnesses.

The defense also produced evidence that Howard was in Wallin's saloon in the evening, throwing dice with Isdell and Rutan. The next morning Isdell and Wallin were arrested, and Wallin then went to see Howard. He did not find him, but left word for Howard to come and see him, which he did. Wallin says he told Howard that Rutan claimed to have been robbed in the saloon. Howard said he wasn't robbed that he knew anything about; that he shook dice with him for money, but did not say for how much. Wallin said: "He claims he was robbed, and takes me for you." Howard responded: "What am I going to do about it?" Wallin said: "We are arrested, and you know I never shook dice that night." Howard then said: "What are you going to do about it?" And Wallin responded: "You know your own business. You know you were standing at the bar, and both went out as soon as I came in." Howard said: "What would you do?" And Wallin replied: "I don't know anything about what you did, or anything about it, and I don't propose to know." The next he heard Howard was gone, and he was unable to find him. Howard's story was that he only stepped into Wallin's for a moment after half-past 10 in the evening; that Wallin was counting over some money and Isdell stood by him; that he got a drink of Isdell and then left; that subsequently he went to see Wallin, in response to a request sent him, and Wallin took out \$30 and gave him, and told him to keep mum and that he had better go away for awhile, which he promised to do. That afternoon or evening he saw Wallin again, who inquired if he was not gone yet, and said he might as well go then as any time, if he was going; and Howard did then go, first to Alpena and then to Cheboygan, where he was arrested and brought back.

When the witness Tilloch was on the stand he was asked the question: "Is there any doubt existing in your mind that the man you saw standing at the right-hand side of Rutan, at the time when you looked through, was this defendant, Wallin?" The question was objected to as incompetent. It sought to bring out, it is said, not what the witness saw at the time and the impression then made, but the conclusion to which he

had subsequently arrived. This conclusion might depend much upon the character of the witness. With one person an impression might strengthen until it became a certainty in the mind; with another, reflection might remove it. But, while this may be true, we think the question unobjectionable. The witness had testified that he thought the man he saw was Wallin. When, when testifying, had any doubts of the identity, it was proper to ascertain the fact; if he had none, the grounds of his belief might be inquired into. The jury were entitled to know what the witness knew respecting the identity, and how positive his knowledge was. If he was speaking doubtfully they should know it, and if with confidence it was proper they should know the grounds of his confidence. Tilloch was also permitted to testify that Rutan, the next day, pointed out Wallin to him and said he was one of the parties who robbed him, the remark not being made in Wallin's presence. This is assigned for error. But the fact that Wallin was not within hearing is of no importance. The statement was no evidence of Wallin's guilt; it was only a circumstance attending the search for the guilty parties and the arrest, and was of no importance except as it showed that Rutan's belief that Wallin and not Howard was the man concerned had been continuous. Wallin, when testifying on his own behalf, testified to the officers' coming in and arresting Isdell the next morning, and was then asked whether he assisted the officers in any way in investigating the robbery. This was objected to, but the objection was overruled, and he replied: "No, sir; I just told them that Dave [Isdell] and Curley [Howard] went out together; they were in there when I went in. I could not tell them anything I did not know." Complaint is made of this question, but, we think, without reason. The crime had been committed in defendant's place of business and his servant had been concerned. There was strong evidence connecting him personally with the crime, and when he took the witness stand in exculpation it was proper to permit the prosecution to inquire what his conduct in connection with the accusation had been, that it might be seen how far it was consistent with the innocence he was testifying to.

Some other errors are assigned upon the admission of testimony, for which no reasons are assigned in the brief for the

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When the defense rested the theory persons, a robbery, and Isdell. It is the pri William I at a verdi one of the you have ant Wall assisted defendant The judge saying the added: "That is from the that Wal If you are before, the arms. T ing the t view; to near the had som with, bu water-cl he is."

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defense, and, as error is not apparent, we pass them without further remark.

When the case was about to be submitted to the jury the defense requested the judge to charge them as follows: "It is the theory both of the prosecution and the defense that two persons, and two persons only, were concerned in the alleged robbery, and it is conceded that one of these persons is David Isdell. It is claimed by the prosecution that the other person is the prisoner, and by the defense that the other person is William Howard, one of the people's witnesses. In arriving at a verdict you are not to consider any other theory than this one of the prosecution and defense; and if, from the testimony, you have a reasonable doubt as to whether or not the defendant Wallin, or the witness Howard, or any other person, assisted Isdell in committing this robbery, you must give defendant Wallin the benefit of that doubt and acquit him." The judge did not give this instruction in terms; but, after saying that Isdell confessedly was one of the guilty parties, he added: "The question in this case is, who is the other man? That is the question for you to decide. If you are satisfied from the testimony in this case, beyond a reasonable doubt, that Wallin was the other party, you ought to find him guilty. If you are not so satisfied, you ought to acquit him. As I said before, the other party who is guilty is the party who held his arms. That is the man you are looking for. And in considering the testimony I invite you to consider it with that end in view; to ascertain who that man was who held his arms there near the water-closet. Not any other man that he may have had something to do with, or that he may have shaken dice with, but the man that held his arms when he was near the water-closet is the party you want to find, and ascertain who he is."

The complaint made of this instruction is that it suggested the presence and participation of some third person, when there was nothing in the record tending to show it, and all the evidence showed that the person who threw dice with Rutan was the person who assisted in robbing him. This, it is said, may have misled the jury. And later, in response to an inquiry by the jury, the judge said: "If you should find from the testimony in this case that defendant Wallin was in the

saloon at the time Rutan was there, and that he took hold of Rutan's arms as he was about to leave, with a design to detain him in the saloon, and also with a design and intent that he should then and there be robbed of his money, and should also find that he was robbed of his money at that time, although Wallin may not have been the man who held him or abstracted the money, he would by the act of detention for that purpose, in that design, be an aider and abettor in the offense, and would be liable as principal."

Here again is a suggestion that some third party may have participated in the robbery, and that Wallin may have performed the first act in detention and the third party been assistant later. Neither the prosecution nor the defense claimed that this was the fact. But neither the judge nor the jury were tied down closely to the theories respectively advanced. The facts were laid before them as the parties claimed they were, and they were at liberty to draw their own conclusions, even though they might have differed from both theories. The prosecution said Isdell and Wallin were the guilty parties; the defense said they were Isdell and Howard; but with evidence so much confused as this was, and given by parties who at the time were drinking freely, it would not have been surprising if the jury had believed that neither of the theories advanced was altogether correct or altogether false. A fourth party, it was conceded, was in the saloon at one time while Rutan was there; and the request for instructions made by the defense seems to concede the possibility that the jury might have doubts whether this fourth party was not the assistant in the robbery. But, whether the evidence did or did not warrant such a suggestion, we do not think a casual remark like that made by the judge could be made the subject of legal exception. In the first place, it is difficult to understand how it could be damaging to the defense to suggest that possibly some other person might have been concerned in the robbery. It would seem, on the other hand, to be probably favorable. But if the defense thought otherwise, and considered the remark unwarranted, they should have called attention to it at the time and given the judge an opportunity for correction. If, when the judge comments on the facts, as the parties called upon him to do in this case, every word and every sentence

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may be the subject of a general objection, and must be justified on error when for the first time the reasons for the exception are given, no verdict, in a closely-contested trial as this was, would be likely to stand. This is not the way to deal with a charge; it should be assumed that the judge intends accuracy, and if, carelessly, he is inaccurate, he should at once be given opportunity for correction.

The defense also asked the judge to instruct the jury that as Isdell admitted his own guilt, and as it appeared from his evidence that he expected favor when he came to be sentenced because of giving his evidence, they must consider him a person unworthy of credit, and should give little, if any, credit to his testimony, and would not be justified in convicting the defendant upon it. Also, that "in considering his testimony they must bear in mind its worthless and unreliable character, and would not be authorized in considering it as corroborating other testimony." The judge declined to give such instructions, but told the jury all questions of credibility of testimony were for them.

It is not the right of any party to demand such instructions as were here proposed. There is no such rule of law as the requests assume. The force of a witness' testimony depends upon the credit the jury think it entitled to; and no court has a right to lay down for a jury rules whereby they shall determine the force of evidence, irrespective of the credence they actually give it in their own minds. *People v. Jenness*, 5 Mich., 305; *People v. Schweitzer*, 23 Mich., 301. The facts which manifestly detract from the credit are before the jury, and it is supposed they will duly weigh them; and specific directions that they must or must not believe a witness are an invasion of their province. The judge was right in declining them in this case, and he was right in saying to the jury as he did in substance, that when the law permits persons to testify as witnesses, it assumes that they may tell the truth, and whether they have done so in the case is for the jury to say under all the circumstances appearing before them.

The defense also requested the judge to point out to the jury the circumstances tending to discredit the witness Howard, and this was refused. We repeat that instructions respecting the credibility of witnesses, which involve no question of law,

are not matter of right. The judge is under no obligation to comment upon the facts; he may, if he chooses, confine himself strictly to laying down such rules of the law as must guide the action of the jury, and leave the facts to them without a word of comment. In many cases this is no doubt the desirable course. And it is always within the discretion of the judge to adopt it.

Criticism is made of the judge's instructions on the presumption of innocence, to which the defendant was entitled; but we think it not well founded. The charge on that subject was full, and, as we think, fair and accurate. It is also complained that in calling attention to the evidence of the defendant, on his own behalf, the facts that would tend to detract from his credibility were pointed out, though it was not done in the case of the witnesses Isdell and Howard. Here, again, the fault found concerns the exercise of the judge's discretion. What the judge said was correct, and the fault found with him is that he did not go further and extend his comments to the testimony of other witnesses. But no abuse of discretion appears in the case, and therefore nothing which will support an exception. The defendant, so far as we can judge by the record, has had a fair trial, and we discover nothing indicating a purpose on the part of the judge that he should be dealt with otherwise than fairly and justly.

No legal error appearing, the conviction must be affirmed.

(The other justices concur.)

NOTE.—*Testimony of confederate.*—In *People v. Hare*, 57 Mich., 505, it is held that where a confederate in crime is promised leniency on condition that he will turn state's evidence, his testimony is to be regarded with suspicion; and the fact that he is a confessed confederate, and is yet uninformed against and unprosecuted, may be shown by defendant as affecting his credibility. The credibility of an accomplice, like that of any other witness, is a question for the jury.

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PEOPLE v. CUMMONS.

(50 Mich., 544.)

EVIDENCE: Enticing away a girl for purpose of prostitution.

ENTICING AWAY GIRL FOR PURPOSE OF PROSTITUTION—EVIDENCE.—Evidence that a party accused of enticing away a girl under sixteen years of age for the purpose of prostitution, invited her to his photographic rooms at various times, showed her obscene pictures, paid her small sums of money, and on several occasions had illicit intercourse with her, up to the time when she was discovered by her mother and removed, will be sufficient to sustain a conviction.

Exceptions from Recorder's Court of Detroit.

Moses Tuggart, attorney-general, for the people.

G. X. M. Collier and *W. B. Jackson*, for respondent.

CAMPBELL, J. Respondent was convicted under the statute of enticing away a girl under sixteen years of age for the purpose of prostitution. Various exceptions were taken, but the only point argued was whether there was any case made that the intent was for the purpose named. The testimony showed that respondent began his contrivances as early as May, 1883, by inviting the girl to visit his photographic rooms, showing her obscene pictures, and giving her small sums of money, and finally had illicit intercourse with her at several times, up to December, when her mother found her there, although he denied her presence, and she was removed. The girl testified to the various acts and circumstances, and to his promise to pay her.

The statute which names as illegal purposes of such enticement of females under the age of consent, include marriage, concubinage and prostitution. The last two were evidently intended to cover all cases of lewd intercourse. Neither of these words has any common law meaning, but both are popular phrases, either of which might be made to cover the crime here shown without any change from general usage. We can see no reason whatever for attempting to narrow them. The statutory purpose is clear, and there is no difficulty in carrying it out.

The conviction was right, and it must be certified to the court below that sentence should pass upon it.

(The other justices concurred.)

UNITED STATES v. RAUSCHER.¹

(119 U. S., 407.)

EXTRADITION: *Depends on treaties—The Ashburton treaty—The federal and not the state government to negotiate for surrender of fugitives—Can be tried only for offense specified in the demand.*

1. **MURDER—FUGITIVES FROM JUSTICE—INTERNATIONAL LAW.**—Apart from the provisions of the treaties on the subject, there exists no well-defined obligation on one independent nation to deliver to another fugitives from its justice; and though such delivery has often been made, it was upon the principle of comity. The right to demand it has not been recognized as among the duties of one government to another which rest upon established principles of international law.
2. **THE NATIONAL AND NOT THE STATE GOVERNMENT TO NEGOTIATE FOR SURRENDER OF FUGITIVES.**—In any question of this kind which can arise between this country and a foreign nation, the extradition must be negotiated through the federal government, and not by that of a state, though the demand may be for a crime committed against the law of that state. With most of the civilized nations of the world with which the United States have much intercourse, this matter is regulated by treaties, and the question now decided arises under the treaty of 1842 between Great Britain and the United States, commonly called the Ashburton treaty.
3. **FUGITIVE CANNOT BE TRIED FOR AN OFFENSE OTHER THAN THAT SPECIFIED IN THE DEMAND FOR HIS SURRENDER.**—The defendant in this case being charged with murder on board an American vessel on the high seas, fled to England, and was demanded of the government of that country, and surrendered on this charge. The circuit court of the United States for the southern district of New York, in which he was tried, did not proceed against him for murder, but for a minor offense not included in the treaty of extradition; and the judges of that court certified to this court for its judgment the question whether this could be done. *Held:*

(1) That a treaty to which the United States is a party is a law of the land, of which all courts, state and national, are to take judicial notice, and by the provisions of which they are to be governed, so far as they are capable of judicial enforcement.

(2) That, on a sound construction of the treaty under which the defendant was delivered to this country, and under the proceedings by which this was done, and acts of congress on that subject (R. S., secs. 5272, 5275), he cannot lawfully be tried for any other offense than murder.

(3) The treaty, the acts of congress, and the proceedings by which he was extradited, clothe him with the right to exemption from trial for any other offense, until he has had an opportunity to return to the country from which he was taken for the purpose alone of trial for the offense specified in the demand for his surrender. The national honor

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also requires that good faith shall be kept with the country which surrendered him.

(4) The circumstance that the party was convicted of inflicting cruel and unusual punishment, on the same evidence which was produced before the committing magistrate in England, in the extradition proceedings for murder, does not change the principle.

The case is stated in the opinion of the court.

Mr. Solicitor-General Goode, for the United States.

Mr. A. J. Dittenhoefer, for Rauscher.

Mr. Justice MILLER delivered the opinion of the court.

This case comes before us on a certificate of division of opinion between the judges holding the circuit court of the United States for the southern district of New York, arising after verdict of guilty, and before judgment, on a motion in arrest of judgment.

The prisoner, William Rauscher, was indicted by a grand jury, for that, on the 9th day of October, 1884, on the high seas, out of the jurisdiction of any particular state of the United States, and within the admiralty and maritime jurisdiction thereof, he, the said William Rauscher, being then and there second mate of the ship J. F. Chapman, unlawfully made an assault upon Janssen, one of the crew of the vessel of which he was an officer, and unlawfully inflicted upon said Janssen cruel and unusual punishment. This indictment was found under section 5347 of the Revised Statutes of the United States.

The statement of the division of opinion between the judges is in the following language:

"This cause coming on to be heard at this term, before judgment upon the verdict, on a motion in arrest of judgment, and also on a motion for a new trial before the two judges above mentioned, at such hearing the following questions occurred:

"*First.* The prisoner having been extradited upon a charge of murder on the high seas of one Janssen, under section 5339, Revised Statutes, had the circuit court of the southern district of New York jurisdiction to put him to trial upon an indictment under section 5347, Revised Statutes, charging him with cruel and unusual punishment of the same man, he being one of the crew of an American vessel of which the defendant was an

officer, and such punishment consisting of the identical acts proved in the extradition proceedings?

"*Second.* Did or not the prisoner, under the extradition treaty with Great Britain, having been surrendered upon a charge of murder, acquire a right to be exempt from prosecution upon the charge set forth in the indictment, without being first afforded an opportunity to return to Great Britain?

"*Third.* Was it error on the part of the trial judge to overrule a plea to the jurisdiction of the court to try the indictment under section 5347 of the United States Revised Statutes, charging the accused with cruel and unusual punishment of one Janssen, one of the crew of a vessel of which accused was an officer, it having been established upon said plea that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder of the same Janssen, under section 5339 of the United States Revised Statutes?

"*Fourth.* Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was investigated, and the same witnesses examined, as at the trial?

"In respect to each of which questions the judges aforesaid were divided in opinion.

"Wherefore, at the same term, at the request of the United States attorney, they have caused the points above stated to be certified under the seal of this court, together with a copy of the indictment and an abstract of the record, to the supreme court of the United States for final decision according to law.

"WM. J. WALLACE.

"CHAS. L. BENEDICT."

The treaty with Great Britain, under which the defendant was surrendered by that government to ours upon a charge of murder, is that of August 9, 1842, styled "A treaty to settle and define the boundaries between the territories of the United States and the possessions of Her Britannic Majesty in North America; for the final suppression of the African slave trade; and for the giving up of criminals, fugitives from justice, in certain cases." 8 Stat., 576.

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With the exception of this caption, the tenth article of the treaty contains all that relates to the subject of extradition of criminals. That article is here copied as follows:

"It is agreed that the United States and Her Britannic Majesty shall, upon mutual requisitions by them, or their ministers, officers, or authorities, respectively made, deliver up to justice all persons who, being charged with the crime of murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper, committed within the jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other; provided that this shall only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offense had there been committed; and the respective judges and other magistrates of the two governments shall have power, jurisdiction and authority, upon complaint made under oath, to issue a warrant for the apprehension of the fugitive or person so charged, that he may be brought before such judges or other magistrates, respectively, to the end that the evidence of criminality may be heard and considered; and if on such hearing the evidence be deemed sufficient to sustain the charge, it shall be the duty of the examining judge or magistrate to certify the same to the proper executive authority, that a warrant may issue for the surrender of such fugitive."

Not only has the general subject of the extradition of persons charged with crime in one country, who have fled to and sought refuge in another, been matter of much consideration of late years by the executive departments and statesmen of the governments of the civilized portion of the world, by various publicists and writers on international law, and by specialists on that subject, as well as by the courts and judicial tribunals of different countries, but the precise questions arising under this treaty, as presented by the certificate of the judges in this case, have recently been very much discussed in this country and in Great Britain.

It is only in modern times that the nations of the earth have imposed upon themselves the obligation of delivering up these fugitives from justice to the states where their crimes were

committed, for trial and punishment. This has been done generally by treaties made by one independent government with another. Prior to these treaties, and apart from them, it may be stated as the general result of the writers upon international law, that there was no well-defined obligation on one country to deliver up such fugitives to another, and though such delivery was often made, it was upon the principle of comity, and within the discretion of the government whose action was invoked; and it has never been recognized as among those obligations of one government towards another which rest upon established principles of international law.

Whether in the United States, in the absence of any treaty on the subject with a foreign nation from whose justice a fugitive may be found in one of the states, and in the absence of any act of congress upon the subject, a state can, through its own judiciary or executive, surrender him for trial to such foreign nation, is a question which has been under consideration by the courts of this country without any very conclusive result.

In the case of *Daniel Washburn*, 4 Johns. Ch., 106; S. C., 8 Am. Dec., 548, who was arrested on a charge of theft committed in Canada, and brought before Chancellor Kent upon a writ of *habeas corpus*, that distinguished jurist held that, irrespective of all treaties, it was the duty of a state to surrender fugitive criminals. The doctrine of this obligation was presented with great ability by that learned jurist; but shortly afterward Chief Justice Tilghman, in the case of *Short v. Deacon*, 10 S. & R., 125, in the supreme court of Pennsylvania, held the contrary opinion — that the delivery up of a fugitive was an affair of the executive branch of the national government, to which the demand of the foreign power must be addressed; that judges could not legally deliver up, nor could they command the executive to do so; and that no magistrate in Pennsylvania had the right to cause a person to be arrested in order to afford the president of the United States an opportunity to deliver him up, because the president had already declared he would not do so.

In the case of *Holmes v. Jennison*, 14 Pet., 540, on a writ of error to the supreme court of Vermont, it appears that application had been made to the president for the extradition of

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Holmes, a naturalized citizen of the United States, who was charged with having committed murder in Lower Canada. There being then no extradition treaty between the two governments, the president declined to act, through an alleged want of power. Holmes having been arrested under authority from Governor Jennison, of Vermont, obtained a writ of *habeas corpus* from the supreme court of that state, and the sheriff returned that he was detained under an order of the governor, which commanded the sheriff to deliver him up to the authorities of Lower Canada, and the supreme court of the state held the return sufficient. On the writ of error from the supreme court of the United States two questions were presented: first, whether a writ of error would lie in such case from that court to the supreme court of the state; and, second, whether the judgment of the latter court was right. The eight judges who heard the case in this court were equally divided in opinion on the first of these questions, and therefore no authoritative decision of the principal question could be made. A very able and learned opinion in favor of the appellate jurisdiction of the supreme court of the United States, and against the right attempted to be exercised by the governor of Vermont, was delivered by Chief Justice Taney, with whom concurred Justices Story, McLean and Wayne. Justices Thompson, Barbour and Catron delivered separate opinions, denying the power of the supreme court of the United States to revise the judgment of the supreme court of Vermont. These latter, with whom concurred Justice Baldwin, did not express any clear opinion upon the power of the authorities of the state of Vermont, either executive or judicial, to deliver Holmes to the government of Canada; but, upon return of the case to the supreme court of that state, it seems that that court was satisfied by the arguments of the chief justice and those who concurred with him of the error of its position, and Holmes was discharged. In the final disposition of the case the court uses the following language:

"I am authorized by my brethren," says the chief justice, "to say that, on an examination of this case, as decided by the supreme court of the United States, they think, if the return had been as it now is, a majority of that court would have decided that Holmes was entitled to his discharge, and that the

opinion of a majority of the supreme court of the United States was also adverse to the exercise of the power in question by any of the separate states of the Union. The judgment of the court therefore is, that Holmes be discharged from his imprisonment." *Ex parte Holmes*, 12 Vt., 631.

The court of appeals of New York, in the case of *The People, etc., v. Curtis*, 50 N. Y., 321, also decided that an act of the legislature of that state, authorizing the rendition to foreign states of fugitives from justice, was in conflict with the constitution of the United States. This was in 1872.

The question has not since arisen so as to be decided by this court, but there can be little doubt of the soundness of the opinion of Chief Justice Taney, that the power exercised by the governor of Vermont is a part of the foreign intercourse of this country, which has undoubtedly been conferred upon the federal government; and that it is clearly included in the treaty-making power and the corresponding power of appointing and receiving ambassadors and other public ministers. There is no necessity for the states to enter upon the relations with foreign nations which are necessarily implied in the extradition of fugitives from justice found within the limits of the state, as there is none why they should in their own name make demand upon foreign nations for the surrender of such fugitives.

At this time of day, and after the repeated examinations which have been made by this court into the powers of the federal government to deal with all such international questions exclusively, it can hardly be admitted that, even in the absence of treaties or acts of congress on the subject, the extradition of a fugitive from justice can become the subject of negotiations between a state of this Union and a foreign government.

Fortunately, this question, with others which might arise in the absence of treaties or acts of congress on the subject, is now of very little importance, since, with nearly all the nations of the world with whom our relations are such that fugitives from justice may be found within their dominions or within ours, we have treaties which govern the rights and conduct of the parties in such cases. These treaties are also supplemented by acts of congress, and both are in their nature exclusive.

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The case we have under consideration arises under one of these treaties made between the United States and Great Britain, the country with which, on account of our intimate relations, the cases requiring extradition are likely to be most numerous. This treaty of 1842 is supplemented by the acts of congress of August 12, 1848 (9 Stat., 302), and March 3, 1869 (15 Stat., 337), the provisions of which are embodied in sections 5270, 5272 and 5275 of the Revised Statutes, under title LXVI, Extradition.

The treaty itself, in reference to the very matter suggested in the questions certified by the judges of the circuit court, has been made the subject of diplomatic negotiations between the executive department of this country and the government of Great Britain in the cases of *Winslow* and *Lawrence*. Winslow, who was charged with forgery in the United States, had taken refuge in England, and, on demand being made for his extradition, the foreign office of that country required a preliminary pledge from our government that it would not try him for any other offense than the forgery for which he was demanded. To this Mr. Fish, the secretary of state, did not accede, and was informed that the reason of the demand on the part of the British government was that one Lawrence, not long previously extradited under the same treaty, had been prosecuted in the courts of this country for a different offense from that for which he had been demanded from Great Britain, and for the trial of which he was delivered up by that government. Mr. Fish defended the right of the government or state in which the offense was committed to try a person extradited under this treaty for any other criminal offense, as well as for the one for which the extradition had been demanded; while Lord Derby, at the head of the foreign office in England, construed the treaty as requiring the government which had demanded the extradition of an offender against its laws for a prescribed offense, mentioned in the treaty and in the demand for his extradition, to try him for that offense and for no other. The correspondence is an able one upon both sides, and presents the question which we are now required to decide, as to the construction of the treaty and the effect of the acts of congress already cited, and of a statute of Great Britain of 1870 on the same subject. The negotiations be-

tween the two governments, however, on that subject were inconclusive in any other sense than that Winslow was not delivered up and Lawrence was never actually brought to judgment for any other offense than that for which his extradition was demanded.

The question was also discussed in the house of lords, and Lord Derby stated and defended his views of the construction of the treaty with marked ability, while he conceded that the act of parliament on that subject, which declared that the person extradited could be tried for no other offense than that for which he had been demanded, had no obligatory force upon the United States as one of the parties to the treaty. *Foreign Relations of the United States, 1876-7, pp. 204-307.*

The subject was also very fully discussed by Mr. William Beach Lawrence, a very learned authority on matters of international law, living in this country, in several published articles. *Albany Law Journal*, volume 14, p. 85; volume 15, p. 224; volume 16, p. 361. In these, the author, with his usual ability, maintains the proposition that a person delivered up under this treaty on a demand charging him with a specific offense, mentioned in it, can only be tried by the country to which he is delivered for that specific offense, and is entitled, unless found guilty of that, to be restored in safety to the country of his asylum at the time of his extradition.

A very able article arising out of the same public discussion at that time, to wit, 1876, is found in the *American Law Review*, said to have been written by Judge Lowell, of the United States court at Boston, in which, after an examination of the authorities upon the general rule, independent of treaties, as found in the continental writers on international law, he says that the rule is, that the person whose extradition has been granted cannot be prosecuted and tried except for the crime for which his extradition has been obtained; and, entering upon the question of the construction of the treaty of 1842, he gives to it the same effect in regard to that matter. *10 Am. Law Review, 1875-6, p. 617.*

Mr. David Dudley Field, in his draft of an outline for an international code, published about the same time, adopts the same principle. *Field's International Code, § 237, p. 122.* It is understood that the rule which he lays down represents as well

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A very learned and careful work, published in this country by Mr. Spear, in 1879, and a second edition in 1884, after considering all the correspondence between our government and Great Britain, upon the subject, the debate in the house of lords, the articles of Mr. Lawrence and Judge Lowell, as well as the treatise of Mr. Clarke, an English writer, with a very exhaustive examination of all the decisions in this country relating to this matter, arrives at the same conclusion. This examination by Mr. Spear is so full and careful that it leaves nothing to be desired in the way of presentation of authorities.

The only English work on the subject of extradition we have been able to find which discusses this subject is a small manual by Edward Clarke, of Lincoln's Inn, published in 1867. He adopts the same view of the construction of this treaty, and of the general principles of international law upon the subject, which we have just indicated.

Turning to seek in judicial decisions for authority upon the subject, as might be anticipated we meet with nothing in the English courts of much value, for the reason that treaties made by the crown of Great Britain with other nations are not in those courts considered as part of the law of the land, but the rights and the duties growing out of those treaties are looked upon in that country as matters confided wholly for their execution and enforcement to the executive branch of the government. Speaking of the Ashburton treaty of 1842, which we are now construing, Mr. Clarke says that "in England the common law being held not to permit the surrender of a criminal, this provision could not come into effect without an act of parliament, but in the United States a treaty is as binding as an act of congress." Clarke on Extradition, 38.

This difference between the judicial powers of the courts of Great Britain and of this country in regard to treaties is thus alluded to by Chief Justice Marshall, in the supreme court of the United States:

"A treaty is, in its nature, a contract between two nations, not a legislative act. It does not generally effect, of itself, the object to be accomplished, especially so far as its operation is infra-territorial, but is carried into execution by the sovereign

power of the respective parties to the instrument. In the United States a different principle is established. Our constitution declares a treaty to be the law of the land. It is, consequently, to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid of any legislative provision. But when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial, department, and the legislature must execute the contract before it can become a rule for the court." *Foster v. Neilson*, 2 Pet., 253, 314.

This whole subject is fully considered in *The Head Money Cases*, 112 U. S., 580, in which the effect of a treaty as a part of the law of the land, as distinguished from its aspect as a mere contract between independent nations, is expressed in the following language:

"A treaty is primarily a compact between independent nations. It depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it. If these fail, its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war. It is obvious that with all this the judicial courts have nothing to do and can give no redress. But a treaty may also contain provisions which confer certain rights upon the citizens or subjects of one of the nations residing in the territorial limits of the other, which partake of the nature of municipal law, and which are capable of enforcement as between private parties in the courts of the country. An illustration of this character is found in treaties which regulate the mutual rights of citizens and subjects of the contracting nations in regard to rights of property by descent or inheritance, when the individuals concerned are aliens. The constitution of the United States places such provisions as these in the same category as other laws of congress, by its declaration that 'this constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land.' A treaty, then, is a law of the land, as an act of congress is whenever its provisions prescribe a rule by which the rights of

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the private citizen or subject may be determined. And when such rights are of a nature to be enforced in a court of justice, that court resorts to the treaty for a rule of decision for the case before it as it would to a statute." Pages 598-99. See, also, *Chew Heong v. United States*, 112 U. S., 536, 540, 565.

The treaty of 1842 being, therefore, the supreme law of the land, which the courts are bound to take judicial notice of, and to enforce in any appropriate proceeding the rights of persons growing out of that treaty, we proceed to inquire, in the first place, so far as pertinent to the questions certified by the circuit judges, into the true construction of the treaty. We have already seen that, according to the doctrine of publicists and writers on international law, the country receiving the offender against its laws from another country had no right to proceed against him for any other offense than that for which he had been delivered up. This is a principle which commends itself as an appropriate adjunct to the discretionary exercise of the power of rendition, because it can hardly be supposed that a government which was under no treaty obligation, nor any absolute obligation of public duty, to seize a person who had found an asylum within its bosom and turn him over to another country for trial, would be willing to do this, unless a case was made of some specific offense of a character which justified the government in depriving the party of his asylum. It is unreasonable that the country of the asylum should be expected to deliver up such person to be dealt with by the demanding government without any limitation, implied or otherwise, upon its prosecution of the party. In exercising its discretion it might be very willing to deliver up offenders against such laws as were essential to the protection of life, liberty and person, while it would not be willing to do this on account of minor misdemeanors or of a certain class of political offenses in which it would have no interest or sympathy. Accordingly, it has been the policy of all governments to grant an asylum to persons who have fled from their homes on account of political disturbances, and who might be there amenable to laws framed with regard to such subjects and to the personal allegiance of the party. In many of the treaties of extradition between the civilized nations of the world there is an express exclusion of the right to demand the extradition of

offenders against such laws, and in none of them is this class of offenses mentioned as being the foundation of extradition proceedings. Indeed, the enumeration of offenses in most of these treaties, and especially in the treaty now under consideration, is so specific, and marked by such a clear line in regard to the magnitude and importance of those offenses, that it is impossible to give any other interpretation to it than that of the exclusion of the right of extradition for any others.

It is, therefore, very clear that this treaty did not intend to depart in this respect from the recognized public law which had prevailed in the absence of treaties, and that it was not intended that this treaty should be used for any other purpose than to secure the trial of the person extradited for one of the offenses enumerated in the treaty. This is not only apparent from the general principle that the specific enumeration of certain matters and things implies the exclusion of all others, but the entire face of the treaty, including the processes by which it is to be carried into effect, confirms this view of the subject. It is unreasonable to suppose that any demand for rendition, framed upon a general representation to the government of the asylum (if we may use such an expression), that the party for whom the demand was made was guilty of some violation of the laws of the country which demanded him, without specifying any particular offense with which he was charged, and even without specifying an offense mentioned in the treaty, would receive any serious attention; and yet such is the effect of the construction that the party is properly liable to trial for any other offense than that for which he was demanded, and which is described in the treaty. There would, under that view of the subject, seem to be no need of a description of a specific offense in making the demand. But, so far from this being admissible, the treaty not only provides that the party shall be charged with one of the crimes mentioned, to wit, murder, assault with intent to commit murder, piracy, arson, robbery, forgery, or the utterance of forged paper, but that evidence shall be produced to the judge or magistrate of the country of which such demand is made, of the commission of such an offense, and that this evidence shall be such as according to the law of that country would justify the apprehension and commitment for trial of the person so charged. If the

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proceedings under which the party is arrested in a country where he is peaceably and quietly living, and to the protection of whose laws he is entitled, are to have no influence in limiting the prosecution in the country where the offense is charged to have been committed, there is very little use for this particularity in charging a specific offense, requiring that offense to be one mentioned in the treaty, as well as sufficient evidence of the party's guilt, to put him upon trial for it. Nor can it be said that, in the exercise of such a delicate power under a treaty so well guarded in every particular, its provisions are obligatory alone on the state which makes the surrender of the fugitive, and that that fugitive passes into the hands of the country which charges him with the offense, free from all the positive requirements and just implications of the treaty under which the transfer of his person takes place. A moment before he is under the protection of a government which has afforded him an asylum, from which he can only be taken under a very limited form of procedure, and a moment after he is found in the possession of another sovereignty by virtue of that proceeding, but divested of all the rights which he had the moment before, and of all the rights which the law governing that proceeding was intended to secure.

If upon the face of this treaty it could be seen that its sole object was to secure the transfer of an individual from the jurisdiction of one sovereignty to that of another, the argument might be sound; but as this right of transfer, the right to demand it, the obligation to grant it, the proceedings under which it takes place, all show that it is for a limited and defined purpose that the transfer is made, it is impossible to conceive of the exercise of jurisdiction in such a case for any other purpose than that mentioned in the treaty, and ascertained by the proceedings under which the party is extradited, without an implication of fraud upon the rights of the party extradited, and of bad faith to the country which permitted his extradition. No such view of solemn public treaties between the great nations of the earth can be sustained by a tribunal called upon to give judicial construction to them.

The opposite view has been attempted to be maintained in this country upon the ground that there is no express limitation in the treaty of the right of the country in which the

offense was committed to try the person for the crime alone for which he was extradited, and that once being within the jurisdiction of that country, no matter by what contrivance or fraud, or by what pretense of establishing a charge provided for by the extradition treaty he may have been brought within the jurisdiction, he is, when here, liable to be tried for any offense against the laws, as though arrested here originally. This proposition of the absence of express restriction in the treaty of the right to try him for other offenses than that for which he was extradited is met by the manifest scope and object of the treaty itself. The caption of the treaty, already quoted, declaring that its purpose is to settle the boundary line between the two governments; to provide for the final suppression of the African slave trade, adds: "and for the giving up of criminals, fugitive from justice, *in certain cases.*" The treaty, then, requires, as we have already said, that there shall be given up, upon requisitions respectively made by the two governments, all persons charged with any of the seven crimes enumerated, and the provisions giving a party an examination before a proper tribunal, in which, before he shall be delivered up on this demand, it must be shown that the offense for which he is demanded is one of those enumerated, and that the proof is sufficient to satisfy the court or magistrate before whom this examination takes place that he is guilty, and such as the law of the state of the asylum requires to establish such guilt. leave no reason to doubt that the fair purpose of the treaty is that the person shall be delivered up to be tried for that crime and for no other.

If there should remain any doubt upon this construction of the treaty itself, the language of two acts of congress, heretofore cited, incorporated in the Revised Statutes, must settle this question at rest. It is there declared (R. S., sec. 5272), the two preceding sections having provided for a demand upon this country, and for the inquiry into the guilt of the party, that "it shall be lawful for the secretary of state, under his hand and seal of office, to order the person so committed to be delivered to such person or persons as shall be authorized, in the name and on behalf of such foreign government, *to be tried for the crime of which such person shall be so accused*, and such person shall be delivered up accordingly."

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For the protection of persons brought into this country by extradition proceedings from a foreign country, section 5275 of the Revised Statutes provides:

"Whenever any person is delivered by any foreign government to an agent of the United States for the purpose of being brought within the United States and tried for any crime of which he is duly accused, the president shall have power to take all necessary measures for the transportation and safe-keeping of such accused person, and for his security against lawless violence until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter, and may employ such portion of the land or naval forces of the United States, or of the militia thereof, as may be necessary for the safe-keeping and protection of the accused."

The obvious meaning of these two statutes, which have reference to all treaties of extradition made by the United States, is that the party shall not be delivered up by this government to be tried for any other offense than that charged in the extradition proceedings; and that, when brought into this country upon similar proceedings, he shall not be arrested or tried for any other offense than that with which he was charged in those proceedings, until he shall have had a reasonable time to return unmolested to the country from which he was brought. This is undoubtedly a congressional construction of the purpose and meaning of extradition treaties such as the one we have under consideration, and whether it is or not, it is conclusive upon the judiciary of the right conferred upon persons brought from a foreign country into this under such proceedings.

That right, as we understand it, is that he shall be tried only for the offense with which he is charged in the extradition proceedings and for which he was delivered up, and that if not tried for that, or after trial and acquittal, he shall have a reasonable time to leave the country before he is arrested upon the charge of any other crime committed previous to his extradition.

This precise question has been frequently considered by

courts of the highest respectability in this country. One of the earliest cases is that of *United States v. Caldwell*, 8 Blatchford, 131. Caldwell was extradited from Canada, in 1870, under the treaty of 1842 with Great Britain, charged with forgery. He was not tried for this offense, however, but was tried and convicted for bribing an officer of the United States—an offense not designated in that treaty. In the circuit court of the United States, held by Judge Benedict, Caldwell called the attention of the court to this fact, and claimed that under the treaty he could not be tried for any offense committed prior to his extradition other than the one charged in the proceedings. To this plea the government interposed a demurrer, which was sustained, and the prisoner was tried, convicted and punished for the bribery. Judge Benedict said that, "while abuse of extradition proceedings, and want of good faith in resorting to them, doubtless constitute a good cause of complaint between the two governments, such complaints do not form a proper subject of investigation in the courts, however much those tribunals might regret that they should have been permitted to arise. . . . But whether extradited in good faith or not, the prisoner, in point of fact, is within the jurisdiction of the court, charged with a crime therein committed; and I am at a loss for even a plausible reason for holding, upon such a plea as the present, that the court is without jurisdiction to try him. . . . And I cannot say that the fact that the defendant was brought within the jurisdiction by virtue of a warrant of extradition for the crime of forgery affords him a legal exemption from prosecution for other crimes by him committed."

The next case tried before the same court was that of *United States v. Lawrence*, 13 Blatchford, 295. Lawrence was extradited from Ireland and brought into this country under the treaty of 1842 on a charge of a single and specific forgery. He was indicted and put upon his trial for other forgeries than that specified in the extradition proceedings. To his trial for any other forgery than that, he objected by proper pleadings, on the ground that under the treaty with Great Britain he could not be so tried for other forgeries. Judge Benedict held that he could be so tried, and he was tried and a verdict of guilty was rendered. It appears, however, but not very clearly from

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any report of the case, that, though tried and convicted, and having pleaded guilty to the other offenses of forgery, he was admitted to bail and no judgment was ever pronounced. Judge Benedict, adverting to the case of *United States v. Caldwell*, and to a decision of the court of appeals of New York in *Adviance v. Lagrave*, 59 N. Y., 110, proceeded to say:

"This ground of defense is, therefore, dismissed, with the remark that an offender against the justice of his country can acquire no rights by defrauding that justice. Between him and the justice he has offended, no rights accrue to the offender by flight. He remains at all times, and everywhere, liable to be called to answer to the law for his violations thereof, provided he comes within the reach of its arm."

And in addition to the proposition urged in the *Caldwell* case, that a question of that character arising on the treaty is exclusively for the consideration of the executive departments of the respective governments, he proceeds to say:

"It is true that it (the act of congress) assumes, as well it may, that the offender will be tried for the offense upon which his surrender is asked, but there are no words indicating that he is to be protected from trial for all other offenses. The absence of any provision indicating an intention to protect from prosecution for other offenses, in a statute having no other object than the protection of extradited offenders, is sufficient to deprive of all force the suggestion that the act of 1869, as a legislative act, gives to the treaty of 1842 the construction contended for by the accused." There are perhaps two or three other cases in which the circuit or district judges of the United States have followed these decisions rendered by Judge Benedict.

On the other hand, Judge Hoffman, of the district court of California, in the case of *United States v. Watts*, 8 Sawyer, 370, decided that the defendant, having been surrendered under the extradition treaty of 1842 by Great Britain, could not be tried for other offenses than those enumerated in that treaty, and supported this view with a very learned and able opinion. Judge Deady, of the district court of Oregon, in *Ex parte Hibbs*, 26 Fed. Rep., 421, 431, February 4, 1886, held, in regard to the treaty of 1842, that for a government to detain a person extradited under that treaty for any other charge than

the one for which he had been surrendered, "would be not only an infraction of the contract between the parties to the treaty, but also a violation of the supreme law of this land in a matter directly involving his personal rights. A right of person or property, secured or recognized by treaty, may be set up as a defense to a prosecution in disregard of either, with the same force and effect as if such right was secured by an act of congress."

But perhaps the most important decisions on this question are to be found in the highest courts of the states.

The case of *Adriance v. Lagrave*, 59 N. Y., 110, has been cited as supporting the doctrine held by Judge Benedict, and undoubtedly the language of the opinion delivered by Chief Justice Church, for the court, in that case, adopts the reasoning of Judge Benedict's opinion. Considering the high character of that court, it may be proper to make an observation or two on that case. *First*. It seems that while Lagrave was held for trial in this country under extradition proceedings, by which he was removed from France under the treaty of 1843 with that nation, being out on bail, he was arrested under a writ in a civil suit for debt, which issued from one of the courts of the state of New York. He made application by a writ of *habeas corpus* to be released from this arrest, on the ground that he was protected from it by the terms of the treaty under which he was surrendered, which, in that respect, are similar to those of the treaty of 1842 with Great Britain. The difference between serving process in a civil action brought by a private party, whether arrest be an incident to that process or not, and the indictment and prosecution of a person similarly situated for a crime not mentioned in the treaty of extradition under which the defendant was by force brought to this country, is too obvious to need comment. And while it is unnecessary to decide now whether he could be so served with process in civil proceedings, it does not follow that he would be equally liable to arrest, trial and conviction for a crime, and especially a crime not enumerated in the extradition treaty, and committed before his removal. *Second*. The case of *Adriance v. Lagrave* was decided in the supreme court of the state by an order discharging Lagrave from arrest under the writ, and the writ was vacated. This judgment was the unanimous opinion of the

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court, in which sat three eminent judges of that state, to wit, Daniels, Davis and Brady. In the court of appeals this judgment was reversed by a divided court, Judges Folger and Grover dissenting.

While this is believed to be the only decision in the highest court of a state adopting that view of the law, there are three or four cases decided by appellate courts of other states, holding a directly opposite doctrine.

The first of these is *Commonwealth v. Hawes*, 13 Bush, 697. Hawes was demanded from the Dominion of Canada under the treaty of 1842, on four indictments charging him with as many acts of forgery, and was delivered up on three of them. He was brought to trial on two of these indictments in the courts of Kentucky and acquitted, while the other two were dismissed on motion of the attorney for the commonwealth. There were, however, other indictments pending against him, charging him with embezzlement, and on one of these a motion was made to bring him to trial. Upon this motion the question was raised whether, under the circumstances in regard to the extradition, he could be tried for that offense. Judge Jackson, before whom the case was pending in the Kenton county criminal court, decided that he was bound to take judicial notice of the treaty of 1842, between the United States and Great Britain, and that the defendant could not be tried for any offense for which he was not extradited, although he was within the power of the court, as the treaty was the supreme law of the land. By the terms of that treaty he held that Hawes could be tried for no other offense, because that treaty provides only for extradition in certain cases, and under certain circumstances of proof, and that the right of asylum is to be held sacred as to anything for which the party was not and could not be extradited. He adds:

"I do not mean to say that he (Hawes) may not hereafter be tried; but what I mean to say is, that in the face of the treaty herein referred to, he is not to be tried until there is a reasonable time given him to return to the asylum from which he was taken."

The case was carried to the court of appeals of Kentucky, in which the whole matter was fully discussed, the opinion of the court, a very able one, being delivered by Chief Justice Lind-

say, in 1878. The substance of the opinion is thus stated in the syllabus:

"1. Extradited criminals cannot be tried for offenses not named in the treaty, or for offenses not named in the warrant of extradition. A prisoner extradited from the Dominion of Canada under article 10 of the treaty of 1842, between the United States and Great Britain, cannot be proceeded against or tried in this state for any other offenses than those mentioned in the treaty, and for which he was extradited, without first being afforded an opportunity to return to Canada; and, after being acquitted on trials for the offenses for which he was extradited, he cannot be lawfully held in custody to answer a charge for which he could not be put on trial."

"3. The right of one government to demand and receive from another the custody of an offender who has sought asylum upon its soil depends upon the existence of treaty stipulations between them, and in all cases is derived from, and is measured and restricted by, the provisions, express or implied, of the treaty."

In 1881 a case involving the same question came before the Texas court of appeals (*Blandford v. State*, 10 Tex. Ct. App., 627), in which the same principles were asserted as in that of Hawes. The case seems to have been very well considered, and the authorities up to that date were fully examined.

In 1883 the same question came before the supreme court of Ohio, in *State v. Vanderpool*, 4 Am. Cr. R., 203. Vanderpool and Jones having been delivered up under the treaty of 1842, by the Dominion of Canada, for offenses specified in that treaty, were tried, convicted and sentenced to the penitentiary for the crimes for which they were extradited. They were afterwards indicted for other offenses, to which they pleaded in abatement that by reason of the facts already stated they could not be tried for these latter offenses until a reasonable time had elapsed after the expiration of their sentences for the crimes of which they had been convicted. The supreme court of Ohio, to which the case came on appeal from the judgment of the court of common pleas, sustained this view, and this was done upon the same general reasoning, already stated, as to the construction to be placed upon the Ashburton treaty, of the obligations of that treaty as a law of the land; and of the

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rights conferred upon the party who was arrested and extradited under its provisions.

Upon a review of these decisions of the federal and state courts, to which may be added the opinions of the distinguished writers which we have cited in the earlier part of this opinion, we feel authorized to state that the weight of authority and of sound principle are in favor of the proposition that a person who has been brought within the jurisdiction of the court by virtue of proceedings under an extradition treaty can only be tried for one of the offenses described in that treaty, and for the offense with which he is charged in the proceedings for his extradition, until a reasonable time and opportunity have been given him, after his release or trial upon such charge, to return to the country from whose asylum he had been forcibly taken under those proceedings.

Two other observations remain to be made. One of these is, that the operation of this principle of the recognition of the rights of prisoners under such circumstances by the courts before whom they are brought for trial, relieves the relations between the executive department of the United States government and the courts of a state before whom such case may be pending, of a tension which has more than once become very delicate and very troublesome. Of course, the interference of the executive branch of the federal government, when it may have been called upon by the nation which has delivered up a person to be tried for an offense against the laws of a state, with the proceedings of a state court in such case, is likely to be resented by such court, and yet, if the only mode of enforcing the obligations of the treaty is through the action of the respective national governments, it would seem that the government appealed to ought to have the right to see that the treaty is faithfully observed, and the rights of parties under it protected. In Great Britain the control of such matters would undoubtedly be recognized by any court to be in the crown, but in this country such a proposition is, to say the least, not unaccompanied by serious embarrassments. The principle we have here laid down removes this difficulty, for under the doctrine that the treaty is the supreme law of the land, and is to be observed by all the courts, state and national, "anything in the laws of the states to the contrary notwithstanding," if the

state court should fail to give due effect to the rights of the party under the treaty, a remedy is found in the judicial branch of the federal government, which has been fully recognized. This remedy is by a writ of error from the supreme court of the United States to the state court which may have committed such an error. The case being thus removed into that court, the just effect and operation of the treaty upon the rights asserted by the prisoner would be there decided. If the party, however, is under arrest and desires a more speedy remedy in order to secure his release, a writ of *habeas corpus* from one of the federal judges or federal courts, issued on the ground that he is restrained of his liberty in violation of the constitution or a law or a treaty of the United States, will bring him before a federal tribunal, where the truth of that allegation can be inquired into, and if it be well founded he will be discharged. *Ex parte Royall*, 117 U. S., 241, 251. State courts also could issue such a writ, and thus the judicial remedy is complete, when the jurisdiction of the court is admitted. This is a complete answer to the proposition that the rights of persons extradited under the treaty cannot be enforced by the judicial branch of the government, and that they can only appeal to the executive branches of the treaty governments for redress.

The other observation we have to make regards an argument presented in this particular case, namely, that the prisoner was convicted on the same testimony which was produced before the magistrate who ordered his extradition. Although it is thus stated in the brief, the record affords no sufficient evidence of it. What is found on that subject in the fourth question certified to this court is as follows:

"Was it error on the part of the trial judge to refuse to direct a verdict of acquittal, after it had been proven that the accused was extradited under the extradition treaty with Great Britain, upon the charge of murder, it also appearing that in the proceedings preliminary to the warrant of extradition the same act was *investigated*, and the same *witnesses* examined, as at the trial?"

It might be a sufficient answer to this argument to say that this does not prove that the *evidence* was the same upon the two trials. Although the act charged may have been the same

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and the witnesses may have been the same, yet the evidence elicited on the last trial may have been very different from that obtained on the first. While the identity of facts investigated in the two trials is charged a little more specifically in the first question, we are of opinion that no importance should be attached to this matter, even if it were found that the party was convicted of inflicting cruel and unusual punishment on the seaman on the same evidence precisely upon which the committing magistrate in Great Britain delivered him up under a charge of murder. It may be very true that evidence which satisfied that officer that the prisoner was guilty of the crime of murder would also establish that he had inflicted cruel and unusual punishment on the person for whose murder he was charged; but as the treaty only justified his delivery on the ground that he was proved to be guilty of murder before the committing magistrate, it does not follow at all that such magistrate would have delivered him on a charge, founded upon precisely the same evidence, of inflicting cruel and unusual punishment, an offense for which the treaty made no provision, and which was of a very unimportant character when compared with that of murder. If the party could be convicted on an indictment for inflicting cruel and unusual punishment where the grand jury would not have found an indictment for murder, the treaty could always be evaded by making a demand on account of the higher offense defined in the treaty, and then only seeking a trial and conviction for the minor offense, not found in the treaty. We do not think the circumstance that the same evidence might be sufficient to convict for the minor offense which was produced before the committing magistrate to support the graver charge, justifies this departure from the principles of the treaty.

This fourth question may also properly be treated as immaterial, for the question is: Should the trial judge have directed a verdict of acquittal? As all the matters set up by the defendant are in the nature of pleas in abatement, going rather to the question of trial on that indictment at that time, and not denying that at some future time, when the defendant may have been properly brought within the jurisdiction of the court or rightfully found within such jurisdiction, he may be then tried, it did not involve an issue on the question of guilty or not

guilty on which the court, if it proceeded to try that question at all, could direct either an acquittal or a conviction. Under the views we have taken of the case, the jurisdiction of the court to try such an offense, if the party himself was properly within its jurisdiction, is not denied, but the facts relied upon go to show that while the court did have jurisdiction to find the indictment, as well as of the questions involved in such indictment, it did not have jurisdiction of the person at that time, so as to subject him to trial. The question, therefore, is immaterial.

The result of these considerations is, that the first of the questions certified to us is answered in the negative; the second and third are answered in the affirmative; and it is ordered to be so certified to the judges of the circuit court.

MR. JUSTICE GRAY, concurring. I concur in the decision of the court upon the single ground that, by the act of congress of March 3, 1869, chapter 141, section 1 (embodied in section 5275 of the Revised Statutes), providing measures by which any person delivered up by a foreign government for the purpose of being tried here for a crime of which he has been accused, may be secured against lawless violence "until the final conclusion of his trial for the crimes or offenses specified in the warrant of extradition, and until his final discharge from custody or imprisonment for or on account of such crimes or offenses, and for a reasonable time thereafter," the political department of the government has clearly manifested its will in the form of an express law (of which any person prosecuted in any court within the United States has the right to claim the protection), that the accused shall be tried only for the crime specified in the warrant of extradition, and shall be allowed a reasonable time to depart out of the United States before he can be arrested or detained for another offense.

Upon the broader question whether, independently of any act of congress, and in the absence of any affirmative restriction in the treaty, a man surrendered for one crime should be tried for another, I express no opinion, because not satisfied that that is a question of law within the cognizance of the judicial tribunals, as contradistinguished from a question of international comity and usage, within the domain of statesmanship and diplomacy.

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Mr. CHIEF JUSTICE WAITE, dissenting. I am unable to concur in the decision of this case. A fugitive from justice has no absolute right of asylum in a country to which he flees, and if he can be got back within the jurisdiction of the country whose laws he has violated he may be proceeded with precisely the same as if he had not fled, unless there is something in the laws of the country where he is to be tried, or in the way in which he was got back, to prevent. I do not understand this to be denied. All, therefore, depends in this case on the treaty with Great Britain under which this extradition was effected, and section 5275 of the Revised Statutes. I concede that the treaty is as much a part of the law of the United States as is a statute; and if there is anything in it which forbids a trial for any other offense than that for which the extradition was made, the accused may use it as a defense to a prosecution on any other charge until a reasonable time has elapsed after his release from custody on account of the crime for which he was sent back. But I have been unable to find any such provision. The treaty requires a delivery up to justice, on demand, of those accused of certain crimes, but says nothing about what shall be done with them after the delivery has been made. It might have provided that they should not be tried for any other offenses than those for which they were surrendered, but it has not. Consequently, as it seems to me, the accused has acquired no new rights under the treaty. He fled from the justice of the country whose laws he violated, and has been got back. The treaty under which he was surrendered has granted him no immunity, and therefore it has not provided him with any new defense. This seems to have been the view taken by the English government during the time of the controversy growing out of the demand made for the extradition of Winslow; for, in the debate in the house of lords, the lord chancellor (Cairns), while supporting the English view of the matter, and referring to the cases which had been cited against it, said: "In that class of cases . . . the prisoners, who had been surrendered on one charge, and who were being tried upon another, themselves attempted to raise the defense that they could not be tried for an offense different from that for which they had been surrendered. Such cases certainly have no application whatever to the present question, because nothing

can be more clear than that a prisoner himself has no right to raise such a defense. Even in France, where . . . the law and practice of extradition goes far beyond that which prevails in this country and in the United States, a prisoner is not permitted to set up such a defense, for the clear reason that he is within the jurisdiction of the court, which has the authority to try him for the offense of which he is charged, and that whether he ought to be tried for an offense other than that for which he has been surrendered is a matter of diplomacy between the two countries, and not a question between the prisoner and the court before which he is being tried." *Foreign Relations of the United States, 1876, 291.*

This is, I think, the true rule, and it is in full accord with the principles applied by this court in *The Richmond*, 9 Cranch, 102, where it was insisted upon by way of defense that a vessel proceeded against for a violation of the non-intercourse act had been seized within the territorial jurisdiction of Spain. As to this Chief Justice Marshall said, in delivering the opinion of the court: "The seizure of an American vessel within the territorial jurisdiction of a foreign power is certainly an offense against that power, which must be adjusted between the two governments. This court can take no cognizance of it, and the majority of the court is of opinion that the law does not connect that trespass, if it be one, with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel." If either country should use its privileges under the treaty to obtain a surrender of a fugitive on the pretense of trying him for an offense for which extradition could be claimed, so as to try him for one for which it could not, it might furnish just cause of complaint on the part of the country which had been deceived, but it would be a matter entirely for adjustment between the two countries, and which could in no way inure to the benefit of the accused except through the instrumentality of the government that had been induced to give him up.

As to section 5275 of the Revised Statutes, I have only to say that, in my opinion, it neither adds to the rights of the accused nor changes the effect of the treaty as a part of the law of the United States. The accused was surrendered by Great Britain to the United States, and the United States are alone

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responsible to that country for whatever may be done with him in consequence of his surrender. He was delivered into the possession of the United States, and, in my opinion, that possession may at any time be regained by the United States, under this statute, from the state or its authorities, so long as the accused remains in custody, if it should be necessary in order to enable them to keep their faith with Great Britain in respect to the surrender.

I do not care to elaborate the argument on either of these questions. My only purpose is to state generally the grounds of my dissent.

NOTE.—The principles announced in *Ker v. The People*, 4 Am. Cr. R., 211, are sustained by the supreme court in its decision on writ of error, found at p. 436, vol. 119, U. S. Reports.

In *Ex parte Reggel*, 5 Am. Cr. R., 218, sections 5278 and 5279 are construed, and in a note to this case, covering some eleven pages, the history of the constitutional provision and of the act of congress of 1793, with reference to fugitives from justice, is fully set forth. Reference to cases from which copious citations are given in regard to the law and practice in extradition cases will be found in the note.

THE STATE v. NEIMEYER.

(66 Ia., 634.)

FALSE PRETENSES: *Evidence — Cross-examination — Reversal — Intent — Variance — Indictment.*

1. CROSS-EXAMINATION NOT GROUND FOR REVERSAL.—Cross-examination not entirely foreign to the testimony in chief, and having any tendency to impair its credibility, is not a ground for a reversal.
2. INTENT.—Fraudulent intent not necessarily shown by false representations made by a purchaser of personal property, but such intent is shown by such representations designedly made to induce the sale and delivery of the property.
3. VARIANCE OF PROOF.—Where it is charged that the defendant said that he was conducting a butcher shop, evidence that he said he must have some cattle to butcher that night sufficiently sustains the charge.

REED, J., dissenting.

Appeal from Cass District Court.

The defendant was convicted of the crime of obtaining property under false pretenses. Judgment was rendered upon the verdict, and he appeals.

L. L. Delano, for appellant.

A. J. Baker, attorney-general, for the state.

ADAMS, J. 1. The evidence shows that in July, 1882, the defendant purchased of one Briggs and one Ish certain cattle, and agreed to pay therefor \$250. The defendant resided at Atlantic, in Cass county. The cattle were purchased at Anita, several miles distant from Atlantic, but in the same county. They were driven to Atlantic the same day, and arrived there late in the afternoon, and were sold by the defendant that evening. He failed to pay for the cattle, and it is claimed by the state that he induced Briggs and Ish to part with them by reason of false representations. There was evidence tending to show that the defendant stated that he must have cattle to butcher that night; that he had money in bank, but would not be able to pay Briggs and Ish that night because the bank would be closed before they would be able to reach Atlantic; that he would, however, go to Anita the next Monday, and pay for the cattle there.

For the purpose of rebutting this evidence the defendant introduced himself as a witness, and testified that he did not say that he had money in bank; and, for the purpose of showing further that it was not understood that he was then in a condition to pay for the cattle, he testified that he told Briggs that there was only one way in which he could buy the cattle; that he should have to have three or four days in which to turn himself; that he did not have the money. The attorney for the state then asked him if he did not sell the cattle that night. The question was objected to as not in cross-examination. The court overruled the objection, and the defendant answered that he did. The allowance of the question is assigned as error.

The defendant contends that the fact elicited upon the cross-examination had no tendency to rebut, modify or discredit any statement made by him in his examination in chief. The statement which the defendant had made was that he told Briggs that he should have to have three or four days in which to turn himself. We do not think that the fact that he sold the cattle that night tended to show directly that he did not make such statement. We must say, too, that we think that

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any inference that could be drawn from the fact is a very slight one. If the opportunity to sell was an unexpected one, no inference at all could be drawn that the defendant did not tell Briggs what he testified he did. But the witness did not say that the opportunity to sell was an unexpected one, nor make any explanation whatever. There was, then, we think, some slight ground for inference on the part of the jury that the defendant expected to sell that night, and did not honestly believe that he needed three or four days in which to turn himself, and did not therefore tell Briggs that he did. Where a cross-examination is not entirely foreign to the testimony given in chief, and has any tendency whatever to impair its credibility, we cannot reverse on account of it.

2. The defendant contends that the court erred in not instructing the jury that it was incumbent upon the state to prove a fraudulent intent. The instruction which the court gave upon this point, and which the defendant contends is insufficient, is in these words: "In order to make out the crime here charged the state must prove the following matters, to wit: (1) That the defendant made to said Briggs and Ish the representations or pretenses substantially as charged in the indictment, or some of them. (2) That such representations or pretenses were false, and known by the defendant to be false when he made them. (3) That defendant made such representations with intent by means thereof to induce Briggs and Ish to sell and deliver to him the property described in the indictment."

The defendant's position, as we understand it, is that the facts pointed out in the instruction as necessary to be proven by the state would not, if proven, necessarily show a fraudulent intent; because such facts might exist consistently with an intention on the part of the defendant to pay for the cattle, and that if he did intend to pay for them his intent was not fraudulent. But in our opinion the position cannot be sustained. It is the seller's right to sell to persons who can meet their obligations at maturity; and where the buyer acquires the property by reason of statements made by him to the seller respecting his condition, to induce the sale, which statements he knows to be false, he cannot excuse himself by saying that he intended to pay. Good intentions cannot supply the place

of ability. It is true, false representations made by the purchaser do not necessarily show a fraudulent intent. *People v. Baker*, 96 N. Y., 340. But they do show such intent if they were designed to induce the sale and delivery of the property, and the jury in the case at bar was substantially so charged.

3. It is said that the false representations charged were not proven. It is charged that the defendant said that he was conducting a butcher shop. The evidence was that he said that he must have some cattle to butcher that night. The essential idea intended to be charged was that he was holding himself out as a butcher, and we think that the evidence so showed.

4. The defendant moved in arrest of judgment for insufficiency of the indictment. The motion was overruled, and the ruling is assigned as error. The essential ground of the motion is stated to be that the indictment is insufficient in not alleging that Briggs and Ish were induced by the false pretenses to sell and deliver their property to the defendant. But in our opinion the indictment does substantially so allege. The indictment, after setting out what the defendant's statements and representations were, contains these words: "That the said statements and representations were then and there made by the said defendant, wilfully, unlawfully, feloniously, designedly, falsely, and with intent to cheat the said Briggs and Ish; that the said statements and representations were made by the defendant then and there for the purpose of inducing the said Briggs and Ish to believe that the said defendant was financially good and responsible for his contracts and their fulfillment, and to cause the said Briggs and Ish to believe that it would be safe to sell and deliver to said defendant the eight head of cattle, and give him time in which to pay for the same; that the said Briggs and Ish did then and there fully believe the said representations and statements to be true, were induced to and did then and there sell and deliver said defendant the said eight head of cattle, and give him time in which to pay for the same."

The defendant contends that all this might be true, and yet Briggs and Ish might not have been induced by the false representations to sell and deliver the cattle to the defendant. If the indictment had charged that Briggs and Ish, believing the

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statements and representations to be true, were induced *thereby*, etc., it would not be contended that it is insufficient. But, by any fair construction, the indictment means the same thing as if the word "thereby" had been supplied. The mind of the reader naturally supplies the word, or something equivalent, and the meaning is not open to any doubt. This, in our opinion, is sufficient.

We see no error in the case, and the judgment must be affirmed.

REED, J. I do not agree with the majority on the last point in the foregoing opinion. In my opinion the indictment is defective. It is not averred in express terms that defendant obtained the property by means of the alleged false pretenses, nor is there any statement of facts which shows necessarily that he did so obtain it.

SIMS v. THE STATE.

(21 Tex. Ct. App., 649.)

FALSE PRETENSES: *Theft — Indictment — Former acquittal.*

1. FALSE PRETENSES AND THEFT — INDICTMENT.— The fact that an indictment for swindling contains allegations of acts on the part of accused that constitute theft does not make the indictment bad for swindling.
2. FORMER ACQUITTAL.— A plea of former acquittal to an indictment for obtaining property under false pretenses by trading cattle to which the accused had no title, for a horse, is not borne out by the fact that the defendant had been tried for stealing the cattle, and acquitted.
3. MOTION FOR CONTINUANCE.— Where it is developed at the trial that the evidence upon which the accused based his motion for a continuance, which motion was overruled, was material and important, a new trial will be granted.¹

Appeal from the District Court of Eastland.

A term of five years in the penitentiary was assessed against the appellant upon his conviction for swindling, under an indictment, the charging part of which reads as follows: ". . . That Dock Sims, late of said county, on or about the 25th day of May, A. D. 1884, and in said county and state of Texas, did

¹See note.

then and there, by means of false pretenses and devices and fraudulent representations, then and there knowingly and fraudulently made by him to G. C. Fort, did induce the said G. C. Fort to deliver to him, the said Dock Sims, and the said Dock Sims did then and there, and by the means aforesaid, acquire from the said G. C. Fort, a certain horse of the value of one hundred dollars (\$100), the same being the personal and movable property of the said G. C. Fort, with the intent to appropriate the same to the use of him, the said Dock Sims, in this, to wit: the said Dock Sims did then and there falsely pretend and fraudulently represent to said G. C. Fort that he, the said Dock Sims, was then and there the owner of four certain cattle, to wit, four work oxen, and had the right to dispose of the same, and did thereby then and there fraudulently induce the said G. C. Fort to exchange his said horse for said cattle, and then and there deliver the said horse to the said Dock Sims, when in fact and truth the said Dock Sims did not own the said cattle, and did not have the right to dispose of the same, and the said Dock Sims then and there knew that said pretenses and representations so made by him to the said G. C. Fort were false,—against the peace and dignity of the state," etc.

J. P. Hammons and B. F. Cotton, for the appellant.

J. H. Burts, assistant attorney-general, for the state.

WILLSON, J. Defendant's first application for a continuance, grounded upon the absence of witnesses whose testimony is alleged to be material to his defense, shows that he used legal and sufficient diligence to obtain said testimony. The application, in other respects, complies fully with the requirements of the law. There can be no question but that the absent testimony, as it is set forth in the application, was material to the defendant, and the evidence adduced on the trial does not render it improbable that it is true, but, on the contrary, tends to corroborate it. We think the court erred in not granting the defendant's motion for a new trial when it appeared from the evidence that the absent testimony was not only material to the defendant, but was probably true. It was not error to overrule the exceptions to the indictment. It charges the of-

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fense of swindling in due form. That the facts set forth in the indictment may have constituted theft does not vitiate the indictment. By the same act the defendant may have committed both theft and swindling, and the state had its election to prosecute him for either offense, but a conviction of one would bar a prosecution for the other.

Defendant's plea of former acquittal was bad upon its face. It should have been, but was not, excepted to for insufficiency. It presented no facts which could operate as a bar to this prosecution. It pleaded a judgment of acquittal of the charge of theft of cattle, while this prosecution is for an entirely different offense. Defendant may have been innocent of the theft of the cattle, and yet guilty of the crime of swindling Fort out of his horse, or he may have been guilty of both offenses, because the two transactions were not the same.

Because the court erred in not granting the defendant a new trial upon the ground that it was developed on the trial that a continuance should have been granted him, the judgment is reversed and the cause is remanded.

NOTE.—*New trial.*—In *Leverich v. The State*, 105 Ind., 277, the defendant having been found guilty of an assault and battery with intent to commit manslaughter, was sentenced to pay a nominal fine and to five years' imprisonment, it having been proved on the trial that the prosecuting witness first attacked the defendant. A motion for a new trial was made upon the ground, among other things, of newly-discovered evidence, consisting of alleged threats by the prosecuting witness against the appellant's life, made prior to the collision between them, which culminated in this prosecution, and affidavits were duly filed in support of this motion. The circuit court overruled the motion, but it was here held error and that a new trial ought to have been granted, because evidence of threats made by the prosecuting witness, and claimed to have been discovered since the trial, was competent and material, and more than mere impeaching evidence. And when evidence that the prosecuting witness or the deceased attacked the defendant has been introduced, proof of previous threats made by him is admissible, because such threats may throw light upon the character of the attack made, although such threats were never communicated to the defendant. See *Wiggins v. People*, 4 Am. Cr. R., 494.

THE STATE V. WILLIAMS.

(103 Ind., 235.)

FALSE PRETENSES: *Indictment — Firm name.*

1. FIRM NAME.— In an indictment for obtaining goods from a firm by false pretenses the names of the individual members need not be set out. To charge that the false pretenses were made to the partnership by its firm name is sufficient.¹
2. ALLEGATIONS.— It is sufficient, as showing that the firm believed the representation to be true, to charge that they "relied on such false representations."
3. UNCERTAINTY IN INDICTMENT.— An indictment in such case not alleging the manner in which the goods were parted with and obtained, so as to show the connection of the false pretenses therewith, is bad for uncertainty.¹

From the Wells Circuit Court.

E. C. Vaughn, prosecuting attorney, for the state.

MITCHELL, C. J. The state by its appeal in this case presents the question of the sufficiency of an indictment for obtaining goods by false pretenses. After the formal part, the indictment charges in substance that Hiram B. Williams, on a date mentioned, "did then and there feloniously, designedly and with intent to defraud Francis H. Leggett & Co., and for the purpose of obtaining credit of and from the firm of Francis H. Leggett & Co., falsely pretend to the said Francis H. Leggett & Co. that the firm known as H. B. Williams & Co., dealing in and selling groceries and general merchandise in the city of Bluffton, Indiana, was composed of H. B. Williams and Reuben Stout, . . . and that the said Reuben Stout was the company, meaning thereby that the said Reuben Stout was a partner of the said H. B. Williams and a member of the firm of H. B. Williams & Co.; and the said firm of Francis H. Leggett & Co., relying on said false representations, and by means of said false representations and pretenses, the said Hiram B. Williams did then and there feloniously obtain from the said Francis H. Leggett & Co. on credit" [here follows a description of various articles of personal property and their value, after which the indictment proceeds], "all of

¹ See note.

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the personal goods and chattels of Francis H. Leggett & Co., with the intent then and thereby to cheat and defraud the said firm of Francis H. Leggett & Co., whereas, in truth and in fact, the said Reuben Stout was not the 'company,' nor a member of said firm of H. B. Williams & Co.," etc. A motion to quash was sustained. As there is no brief on behalf of the appellee, we are without information as to the grounds upon which the indictment was deemed insufficient.

It is said by the prosecuting attorney in his brief that the first objection which was made to the indictment in the court below was that the names of the members of the firm whose property was obtained were not set out. It is claimed that this objection is untenable, by reason of section 1753, Revised Statutes, 1881. This section provides that "when any offense is committed upon, or in relation to, any property belonging to partners, or to several joint owners, or which, when the offense was committed, was in possession of a bailee or tenant, the indictment or information for such offense shall be deemed sufficient if it allege the ownership of such property to be in such partnership by its firm name," etc. Under this section it would doubtless be sufficient to charge the ownership of the property, the possession of which was obtained by means of the alleged false pretenses, to be in the partnership by its firm name; but the question still remains, was it sufficient to charge that the false pretenses were made to the partnership by its firm name? We do not think the statute referred to affects the question. Without regard to the statute, however, it was proper to charge that the representations were made to the partnership by its firm name. In the case of *Com. v. Harley*, 7 Metc., 462, the charge was that the defendants "did designedly and falsely pretend and represent to said George B. Blake & Co. that," etc.; it was held that the indictment was sustained by proof that the representation was made to a clerk of the firm. *Stoughton v. State*, 2 Ohio St., 562; *Com. v. Call*, 21 Pick., 515; 2 Whart. Crim. L., §§ 1171-1212.

The next objection said to have been made to the indictment is that it does not aver that the firm of Francis H. Leggett & Co. believed the representations to be true. The averment in the indictment is that, "relying on said false representations," etc. It was held in *Clifford v. State*, 56 Ind.,

245; that this was a sufficient averment that the representation was believed to be true. It is also said that objection was made to the indictment because it did not appear that the goods were delivered in pursuance of the alleged false representations. The averments in that regard are that, for the purpose of obtaining "credit," certain false representations were made, and that, by means of the representations thus made, Williams did then and there obtain from Francis H. Leggett & Co. "on credit certain goods," etc. It does not appear from the averments in the indictment whether the goods were obtained as a result of negotiations for a purchase, loan or exchange; simply that they were obtained on credit. We think this is too uncertain. The connection between the false pretenses and the obtaining of the goods on credit is not shown.

In *Com. v. Strain*, 10 Metc., 521, it was said that the sale or exchange ought to be set forth in the indictment, and that the false "pretenses should be alleged to have been made with a view to effect such sale or exchange, and that by reason thereof the party was induced to buy or exchange, as the case may be." *State v. Philbrick*, 31 Me., 401. In the case last cited the indictment averred that by means of certain false pretenses the accused did then and there knowingly and designedly obtain one horse of the value of \$50 from one Goff. It was held bad because it contained no allegation that by reason of such false pretenses Goff was induced to sell or exchange his horse. *Todd v. State*, 31 Ind., 514; *State v. Orvis*, 13 Ind., 369; *Johnson v. State*, 11 Ind., 481; *Jones v. State*, 50 Ind., 473; *Wagoner v. State*, 90 Ind., 504.

We think there was no error in the ruling of the court, and the judgment is affirmed.

NOTE.—Where the indictment charges the defendant with obtaining money by false pretenses, and alleges that he represented his indebtedness to be a specified sum, when, in fact, it was much greater, it is competent to prove an item of indebtedness not specifically stated in the indictment, although some items are therein specified. *State v. Long*, 103 Ind., 491. See *Thomas v. The People*, 5 Am. Cr. R., 127, and note.

Ownership of property, how alleged in indictment; firm name, etc., in, see note to *State v. Costin*, 4 Am. Cr. R., 175.

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THE STATE V. SHAEFFER.

(89 Mo., 271.)

FALSE PRETENSES: *Jurisdiction — Bills of exchange — Reasonable doubt.*

1. FALSE PRETENSES — VENUE OF THE OFFENSE.— The crime of obtaining money or property under false pretenses is consummated where the money or property is received, without regard to where the pretenses are made.
2. SAME — JURISDICTION — BILLS OF EXCHANGE.— In a prosecution for obtaining money under false pretenses, in the Missouri criminal court, against a drawer of a draft in Missouri on the bank-account of a drawee in New York, the money being collected through the agency of two other banks of New York and Missouri, respectively, it was held that the crime was not committed in Missouri, and hence the court had no jurisdiction.
3. REASONABLE DOUBT.— The instruction to a jury by a lower court, in applying the rule as to reasonable doubt, to acquit the defendant "if all the facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty," is contrary to the meaning of the term "reasonable doubt," as approved in *State v. Nueslein*, 25 Mo., 111, and repeatedly sanctioned by the supreme court, and was held cause for reversing the judgment on error.

Appeal from Jackson Criminal Court.

J. C. V. Karnes and *J. W. Bebee*, for appellant.*B. G. Boone*, attorney-general, and *W. H. Wallace*, for the state.

HENRY, C. J. The defendant was indicted by the grand jury in the criminal court of Jackson county at the May term, 1885. The following are the charges: The first count charges that the defendant obtained a large amount of money from John I. Blair under false pretenses, the false pretenses consisting of representations to Blair that he, the defendant, had arranged with the heirs of one Anthony to purchase of them for Blair their interest in a certain tract of land, lying in Jackson county, near Kansas City; and that Blair was to have the land at the lowest price at which it could be obtained, when in fact he purchased it at one price, and represented to Blair that he had paid a large sum, and on the foregoing representation obtained from Blair more than the defendant paid to Anthony's heirs. The second count charged that the defendant was the agent of said Blair, and as such received into his possession a

large sum of money, the property of said Blair, which he feloniously converted to his own use. It is not necessary to give any other attention to these two counts, the trial court having, by instruction, withdrawn from the jury all consideration of those counts, confining their inquiry to the charge in the third count, which is as follows: "And the grand jurors aforesaid, upon their oaths aforesaid, do further say and present that Samuel C. Shaeffer, at the county of Jackson, in the state of Missouri, on the ——— day of February, 1884, did unlawfully and feloniously obtain of and from one John I. Blair the sum of \$7,650, lawful money, of the value of \$7,650, of goods, chattels, moneys and properties of said John I. Blair, by means and by use of a cheat and a fraud, and a false and fraudulent representation, and false pretense, and false instrument, and false statement, with intent him, the said John I. Blair, then and there feloniously to cheat and defraud; contrary to the form of the statutes, and against the peace and dignity of the state." On this count the jury found him guilty, and assessed his punishment at imprisonment in the penitentiary for a term of eight years, and defendant has prosecuted his appeal.

The evidence for the state tended to prove that the defendant made representations to Blair to the effect that he had agreed to pay to the Anthony heirs, for their interest in a tract of land near Kansas City, \$8,450, having in fact purchased the same at the price of \$800. The agreement between Blair and defendant, in relation to the interest of the Anthony heirs in the tract, was that Blair would place the money to make that purchase to defendant's credit in such bank at Kansas City as defendant might suggest by telegraph, or that he would pay defendant's draft at sight, National Park Bank, New York. It appears that defendant telegraphed Blair, February 12, 1884, that he had drawn on him for \$19,668.33, which sum included the \$8,450 for the interest of the Anthony heirs. The draft was as follows:

"\$19,668.33. KANSAS CITY, Mo., February 12, 1884.

"At sight, pay to the order of myself nineteen thousand six hundred and sixty-eight dollars and thirty-three hundredths dollars, with exchange, value received, and charge to account of

"JOHN I. BLAIR.

"To Park National Bank, New York City.

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This was indorsed by Shaeffer to the Traders' Bank of Kansas City, which sent it for collection to the United States National Bank, New York, which collected it, and placed it to the credit of the Traders' Bank of Kansas City, which, after being informed of the payment of the draft in New York, paid the amount to Shaeffer at Kansas City.

On this state of facts the question arises, where was the offense with which the defendant is charged committed? It is no crime to make use of false pretenses, unless by means of such pretenses the party making them obtains money or property from another to which he had no right; and the crime is consummated where the money or property is received. *Com. v. Van Tuyl*, 1 Metc. (Ky.), 1; *State v. House*, 55 Iowa, 466; *Stewart v. Jessup*, 51 Ind., 415. In the latter case the substantial fact was that one Kerr, relying upon false representations of Stewart, sold the latter twelve horses which Kerr had shipped to New York, where Stewart got possession of them. Stewart was arrested in Indiana on the charge of obtaining the horses by false pretenses, and, on a preliminary examination before a justice of the peace, was adjudged guilty, and required to give security in the sum of \$3,000 for his appearance in the circuit court to answer the charge. Stewart, not having given the security, was committed to jail, and, upon a writ of *habeas corpus*, was brought before the circuit court of Hamilton county, and, on appeal to the supreme court of the state from a judgment of the circuit court against him, the supreme court reversed the judgment, holding that the crime was not committed in Indiana, where the false representations were made, but in the state of New York, where the property was received. Numerous decisions of that court to the same effect were cited in the opinion.

Norris v. State, 25 Ohio St., 217, is also a case analogous to the case at bar. The defendant was a resident of Clarke county, and, by fraudulent representations as to his solvency, contained in a letter, he induced the Akron Sewer-pipe Company, located in Summit county, to ship him by rail, to Clarke county, a lot of sewer-pipe. He was indicted in Clarke county, but the supreme court held that the crime was committed in Summit, and remarked that "the weight of authority is clearly that the railroad company was the agent of defendant for re-

ceiving the goods at Akron, and carrying them to Springfield, and the delivery to it by the sewer-pipe company was, in legal contemplation, a delivery of the goods to the defendant at Akron."

So, in *People v. Sully*, 5 Parker, Crim. R., 142, defendant was indicted in Buffalo, Erie county, he having obtained by false pretenses, in Buffalo, a check drawn on a bank in Batavia, Genesee county. The indictment was for obtaining the signature to the check, and it was held that he was properly indicted in the county; but the court said: "It is not material where the pretenses were made. The obtaining the signature or property by means of them, with intent to cheat and defraud, completes the crime and determines the place of trial." And further remarked the court: "The prisoner could not have been convicted under the first count, for obtaining the money through or by means of the check, for the money was obtained at Batavia, without the territorial jurisdiction of the court."

So, in *State v. Wyckoff*, 31 N. J. Law, 68, the general proposition is asserted that "a crime is to be tried in the place in which the criminal act has been committed. It is not sufficient that part of such acts shall have been done in such place, but it is the completed act alone which gives jurisdiction."

In *State v. Dennis*, 80 Mo., 594, the defendant was indicted for obtaining, by false pretenses, a lot of mules, and the question was whether he had received the mules in Randolph county, or in the city of St. Louis. In delivering the opinion of the court, Judge Norton said: "It is, however, earnestly insisted by counsel that if any offense was committed the evidence shows that it was committed in the city of St. Louis, and not in Randolph county; and that the demurrer to the evidence should have been sustained on the ground that the Moberly court of common pleas of Randolph county had no jurisdiction. If the premises assumed be well founded, the legal conclusion drawn from it is undoubtedly correct." The judgment was affirmed, the majority of the court holding that the mules were received by defendant in Randolph county. I dissented, believing that the evidence established the reception of the mules in the city of St. Louis. We entertained no doubt that the place where the money or goods are obtained,

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without regard to where the representations were made, is the place where the party should be prosecuted.

Where did Blair pay this money? Where did he lose his property in the money, and his dominion over it? If he deposited it in the Park National Bank to the credit of Shaeffer, that was a payment in New York to Shaeffer. If he had money on deposit to his own credit, and directed the bank to pay it on Shaeffer's check or draft, then, when so paid in New York, whether on Shaeffer's check or draft, he then parted with his money. The United States National Bank was the agent of the Traders' Bank of Kansas City, which was unquestionably the agent of Shaeffer. Neither of the banks was in any sense the agent of Blair; but whether the United States National Bank is to be considered as the agent of Shaeffer or the agent of the Traders' Bank is wholly immaterial, since it is clear that it was not the agent of Blair, or of the National Park Bank. After the National Park Bank paid the money to the United States National Bank, Blair's obligation to pay the money was discharged, and if that bank had become insolvent, or failed to account for the proceeds of the check to the Traders' Bank, Shaeffer could have had no recourse upon Blair. The Traders' Bank received the draft for collection for Shaeffer's accommodation, and paid him the amount of the draft only on the assurance from its correspondent in New York that the Park Bank had paid the draft.

That the Traders' Bank then paid the amount of the draft to Shaeffer was not a payment by Blair. But the substance of this transaction was the collection of the money in New York from Blair, and a disposition in Kansas City by Shaeffer of that money so collected in New York. If, instead of receiving the money, Shaeffer had received property in Kansas City from the Traders' Bank instead of the money, the principle applicable would have been the same. The Traders' Bank paid Shaeffer its money, not Blair's. The United States National Bank held the money sent, not as Blair's money, but really as Shaeffer's, though nominally as the money of the Traders' Bank; and the indorsement of the draft to the Traders' Bank by Shaeffer operated to transfer the proceeds of the draft to the Traders' Bank when paid by the Park National Bank to the United States National Bank. A merchant in New York

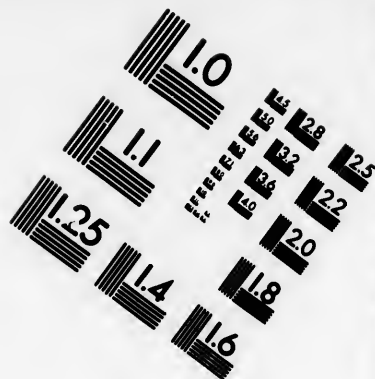
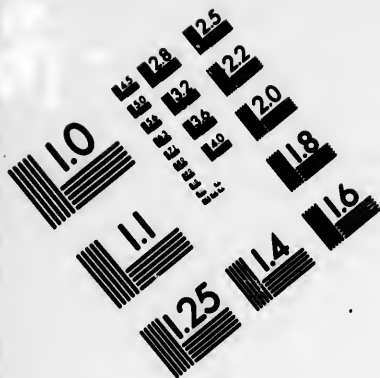
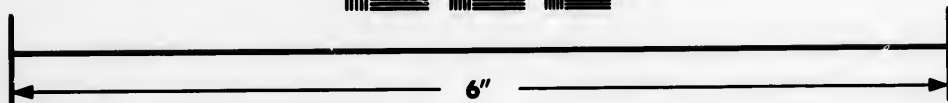
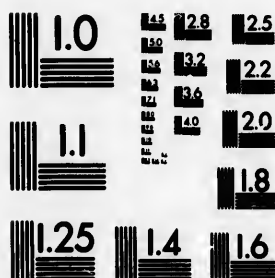


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who draws a draft on a customer in St. Louis, which is paid by the latter to a bank in St. Louis to which the draft is sent for collection, does not thereby pay the money in New York, but in St. Louis, and that the New York merchant indorses it for collection to a bank in New York, and receives the money in New York from that bank, after the latter has notice of the payment of the draft in St. Louis to its correspondents there, does not make the payment by his customer to the bank in St. Louis a payment of the money to the New York merchant in New York.

There are other important questions in this case which it is not thought necessary to determine, inasmuch as, holding that the crime was not committed in Jackson county, and that the criminal court of that county had no jurisdiction of the cause, the judgment must be reversed and the accused discharged. There is, however, one instruction given by the court for the state upon which it is thought best to express our views. It is as follows: "*Sixth*. In law a party accused of crime is presumed to be innocent until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this cause, you entertain a reasonable doubt as to the guilt of defendant, you will give him the benefit of such a doubt, and find him not guilty. In applying the rule as to reasonable doubt, you will be required to acquit if all the facts and circumstances proven can be reasonably reconciled with any theory other than that the defendant is guilty; or, to express the same idea in another form, if all the facts and circumstances proven before you can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty, you must adopt the theory most favorable to the defendant, and return a verdict finding him not guilty. You will observe, however, that the doubt, to authorize an acquittal on that ground alone, must, as stated, be reasonable, and it must be also one fairly deducible from the evidence considered as a whole."

The mere possibility that the defendant may be innocent will not authorize an acquittal. It declares very properly "that one accused of crime is presumed to be innocent until the contrary is proven beyond a reasonable doubt. If, therefore, upon a consideration of all the evidence in this case, you

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entertain a reasonable doubt of the guilt of the defendant, you will give him the benefit of such doubt, and find him not guilty;"—but then proceeds to explain what is meant by a "reasonable doubt" as follows: "In applying the rule as to reasonable doubt, you will be required to acquit if all the facts and circumstances proven can be as reasonably reconciled with the theory that the defendant is innocent as with the theory that he is guilty; you must accept the theory most favorable to the defendant, and render a verdict finding him not guilty." This attempted explanation of the term "reasonable doubt" would eliminate it from the Criminal Code, and leave juries to find verdicts in criminal cases upon the mere preponderance of the evidence. By that explanation the benefit of a reasonable doubt in criminal cases is no more than the advantage a defendant has in a civil case. The doctrine expressed in this explanation is exactly that which is applicable in a civil action, in which, if the facts proven can be reasonably reconciled with the theory that the defendant owes what he is sued for as that he does not, the defendant is entitled to a verdict. The plaintiff must make out his case, and if the evidence is evenly balanced he cannot recover. But for the explanation of what was meant by "reasonable doubt" the instruction correctly declares the law, and why that should have been injected into the instruction is inconceivable.

The instruction in regard to reasonable doubt approved in *State v. Nueslin*, 25 Mo., 111, has been repeatedly sanctioned by this court. Juries understand it, the bench and bar are familiar with it, and it is not safe to depart from it in efforts to make clearer what is well understood. This case illustrates the danger of such experiments. Here the new matter introduced into the instruction vitiated it, and, if for nothing else, the judgment would have been reversed for that error. As long as this court adheres to what it has ruled, especially in criminal cases, it is the better and safer practice for trial courts to be guided by its rulings.

The judgment is reversed, and the prisoner discharged.

(All concur.)

NORTON, J. I place my concurrence in reversing the judgment in this case not only on the ground so clearly stated in

the opinion of the court, but on the further ground that the misrepresentations made by the defendant, if made as disclosed in the evidence, and for which it is sought to make him criminally liable, having been made in the progress of a long, real — not bogus — business transaction, are not mentioned in the class of offenses against which section 1561, Revised Statutes, is directed. In what is here said Judge Ray concurs with me.

ROUNDS V. THE STATE.

(78 Me., 42.)

FORGERY: *Indictment — Intent — Pleading — Error.*

In an indictment for forgery the intent to defraud the person whose name is forged may be alleged, and if the criminal act is proved, such intent will be conclusively presumed, although the respondent in fact intended to defraud another. And, accordingly, where an indictment for forging an order directed to a savings bank contained two counts, in one of which was alleged an intent to defraud the bank, and the other to defraud the depositor whose name was forged, and a general verdict of guilty was rendered, it was held that an entry of *nolle prosequi* as to the first count, after the verdict, did not invalidate the proceedings.

Harvey D. Hadlock, for the plaintiff in error.

Orville D. Baker, attorney-general, for the state.

PETERS, C. J. In this writ an error assigned is that the counts upon which judgment was rendered cannot stand, because they allege that the forger's intent was to defraud Frank E. Snow. The forged order was in Snow's name, as maker, and of the following tenor:

"WEST SCARBORO, January 19, 1882.

"*To the Treasurer of the Maine Savings Bank:* Pay to Samuel Rounds the full amount of deposit, and interest, on my account.

FRANK E. SNOW."

It is contended that the counts should have alleged that the forger intended to defraud the bank, or some person other than Snow; and that there is an impropriety in alleging an intent to defraud Snow, because such a thing is an impossi-

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bility. We think otherwise. It would not be unnatural to suppose that the intention of the forger (Rounds) was to defraud Snow, even if another purpose were coupled with it. If we recollect aright, defense upon the trial of the indictment was not that Snow signed the order with his own hand, but that Rounds signed it with the consent of Snow. Endeavoring to substantiate such an agency, when none existed, certainly makes it evident that the prime and particular intent was to defraud Snow.

In most cases of forging commercial paper perhaps the most obvious intent is to defraud some party upon whom the paper is passed. But may not circumstances exist in any case rendering it possible that the purpose was to injure the person whose name is forged? Does not the forger oftentimes intend to succeed in establishing the feigned as a real signature? Are not deeds and wills falsely made with the idea that the papers will be effectual for the purposes intended by the fabricators? Are not forgeries sometimes so artfully executed that the persons whose names are simulated are sufferers from the act? It is certainly not an extreme idea to say that, in all cases of forgery, there is in the mind of the perpetrator of the crime an expectation—often, of course, not of any very definite character—that he is inflicting an injury upon the person whose name is wrongfully used. The criminal must be aware that such person may be in some peril of loss, and that he will be put to some expense or trouble to protect himself against the forgery.

The plaintiff in error supports his position with no authorities which are pertinent to the point. The authority of the cases and of the book writers is the other way. Mr. Bishop says that the law presumes that the forger intended to defraud the person whose name is forged, and that the indictment may lay the intent accordingly, whatever the real fact may be. He further says of the forger: "He meant also to defraud the person to whom he passed, or attempted to pass, the forged writing for value; and the pleader may so lay the intent, if he pleases." 2 Bish. Crim. Proc., § 422. The doctrine is well supported by the cases cited by Mr. Bishop in the notes to his text. Other writers on criminal law are fully in accord with him. The old common law assumed that the person whose

name was forged was interested in procuring a conviction, and he could not be a witness against the forger. Some American cases have followed the foreign precedents in this respect. See 2 Bish. Crim. Proc., § 429.

A further point of objection to the record is incidentally taken in the argument. It is said that the general verdict finds that the intent was either to defraud the bank or Snow, and removing by *nolle prosequi* the counts alleging fraud upon the bank leaves an uncertainty whether there was a finding of an intent to defraud Snow. This question was carefully considered and definitely settled when the case was up before. *State v. Rounds*, 76 Me., 123. It was there held immaterial whether the finding was that the respondent intended to defraud the bank or Snow. The offense was one and the same whatever the intent; and the proof would be precisely the same, whether to show the one or the other intent. The allegation might be either way, and the result would be the same. It would not have been inconsistent to allege both intents in the same count. There is no inconsistency between them. Both may exist in the same mind at the same time. In fact, the allegation needed no proof. The respondent would not have been allowed to swear that his motive was to injure the bank and not Snow. Mr. Bishop says (2 Crim. Proc., § 427): "Where the intent alleged is to defraud the person whose name is forged, it should be presumed from the forgery without further proof."

The case of *Com. v. Haskins*, 128 Mass., 60, cited by the plaintiff in error, is not relevant. In that case there was a general verdict on different counts, setting forth, not the same offense, but distinctly different offenses,—two distinct crimes entirely inconsistent with each other. Nor is *Com. v. Fitchburg R. R. Co.*, 120 Mass., 372, also cited by plaintiff, a supporting authority, although rather a radical decision, and differing somewhat from previous cases. In that case there were separate verdicts on counts setting out one offense in several different ways totally repugnant to one another. It required different and contradictory evidence to support the counts. A person cannot be killed in several different ways, as there alleged.

The cases cited in the former opinion clearly justify the con-

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clusion there reached. *State v. Whittier*, 21 Me., 341, covers the ground of the case; and *Regina v. Cooke*, 8 Car. & P., 582, is a pertinent authority.

WALTON, VIRGIN, LIBBEY, FOSTER and HASKELL, JJ., concurred.

THE STATE v. HART.

(87 Ia., 142.)

FORGERY: *Indictment — Motion to quash — Evidence — Allegations.*

1. DISCHARGE OF GRAND JURY ILLEGALLY DRAWN — NEW JURY — MOTION TO QUASH. — Where a grand jury has been challenged because not regularly drawn, and such challenge sustained, and a second grand jury impaneled, a party indicted by the second jury cannot move to quash the indictment because the first jury was improperly discharged, and hence the second jury unlawfully impaneled.
2. IMPEACHMENT. — The general moral character of a witness may be proved for the purpose of testing his credibility by a witness who has known him from boyhood, under section 3049, Penal Code of Iowa.
3. ALLEGATIONS. — An allegation of the name of the person to whom the forged instrument was uttered, not necessary in an indictment for forgery.

Appeal from Cass District Court.

Defendant was indicted and convicted of the crime of forgery. He now appeals to this court.

E. Willard and *L. L. De Lano*, for appellant.

A. J. Baker, attorney-general, for the state.

BECK, C. J. I. The defendant moved to set aside the indictment for the reason that the grand jury finding it had not been drawn in the manner prescribed by law. The facts upon which the motion was based are these: A defendant held to answer to a criminal charge had challenged the grand jury on the ground that it was illegally drawn, in that the list of grand jurors had been compared with a transcript of the poll-books and not with the poll-books themselves. See Code, § 240. Upon the consideration of the challenge the district court sustained it, deciding that the jury had not been lawfully drawn, and discharged the grand jury, and another was summoned as

prescribed by code, section 244. Defendant was indicted by the grand jury summoned in the place of the one discharged. He now insists that the first grand jury was illegally discharged, and that the second was therefore unlawfully impaneled.

II. The question of the illegal impaneling of the second jury depends upon the correctness of the decision of the court in discharging the first. If that decision was correct, then the second was lawfully impaneled. It will be held by the law as correct until it is lawfully set aside or reversed. But that cannot be done in a collateral proceeding, and the motion of defendant to quash the indictment is of such a proceeding. We must keep in view the exact facts. Defendant by his motion does not directly assail the decision under which the first jury was discharged; he attacks the order of the court impaneling the second, which he claims was irregular because there was another lawful jury, the first one, or because the decision under which it was discharged was erroneous. He thus, in fact, assails the first order in a collateral proceeding. We need not inquire whether defendant could, under the provisions of the law, assail in any manner the order for the discharge of the first jury. If the statute makes no provision for such a proceeding we cannot supply the omission. The impediment in the way of the administration of the criminal law, which would arise in case defendant's position is sound, would obviously result, in many cases, in the defeat of justice. The order of the court discharging the grand jury would come up for review in all cases wherein indictments should be found by the second grand jury, thus making the administration of justice uncertain. The objection urged by defendant is not commended to us by any showing, or even allegations, of prejudice or possible injustice resulting to defendant by reason of the fact that the indictment was found by the second grand jury. And we cannot imagine any special prejudice that would result to him therefrom, or that the fact in any manner would work injustice. The courts, we think, are beginning to turn their faces from all technical objections made in criminal cases, and from all complaints of irregularities and non-compliance with forms from which no prejudice or injustice could result to the accused. It is well that this disposition now exists, and

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it is to the discredit of the administration of the law that it has not been exhibited in years gone by.

III. A witness who has known defendant well, and has resided in the town where he was raised, testified, in response to a proper question, that his general moral character was bad. This evidence was objected to on the ground that it was "incompetent, immaterial and not rebutting;" and that the impeaching witness must show — which was not done in this case — that he knew the reputation of the witness in the neighborhood where he resided. The code, section 3649, provides that "the general moral character of the witness may be proved for the purpose of testing his credibility." The evidence in question is competent and material under this provision.

IV. If the word "character" used in the section quoted means reputation, we are authorized to believe that the witness used the word in that sense. Indeed, it is commonly so used in conversation. The witness shows that he had known defendant well for many years — ever since he was a small boy, inferentially showing that he was acquainted with defendant's "character" or "reputation" among his neighbors.

V. An instruction of the court directed the jury that the character and reputation of a witness in the community "where he resides, or has resided," may be considered "for the purpose of affecting his credibility." This instruction is objected to on the ground that it permits evidence of reputation in all communities where the witness has resided. Evidently, if the evidence is confined to a recent period, it is competent, and the instruction, probably, ought to have been so limited. If the instruction is erroneous in this respect, the witnesses impeaching defendant all show that they knew defendant well for a great many years, and up to the time of trial, and lived in the county of his residence. No prejudice, therefore, could have resulted to defendant from the error in the instruction, if there be error in this regard.

VI. It is next insisted that as the indictment does not show to whom the forged paper was uttered, the conviction cannot be supported. But the objection was not made except upon a motion in arrest, and no question was made as to the party to whom the paper was uttered. He was the party defrauded by the forgery, and it was not necessary to set out his name in the

indictment. Code, § 4313. See *State v. Maxwell*, 47 Iowa, 434. This court has held that an indictment for forgery which fails to allege the name of the person to whom the forged instrument was uttered is good. *State v. Stuart*, 61 Iowa, 203.

VII. We are of the opinion that the evidence sufficiently supports the conviction.

The foregoing discussion disposes of all questions in the case. Affirmed.

THE PEOPLE v. VAN ALSTINE.

(57 Mich., 69.)

FORGERY OF DEED: *Indictment — Not necessary to set out title — Duplicity — Evidence — Communications made to counsel.*

1. **FORGERY OF TITLE DEED.**— It is not necessary to set out, in an information charging the forgery of a deed, the title of the person intended to be defrauded, nor in what the forgery consisted.
2. **DUPPLICITY — FORGERY AND UTTERING FORGED INSTRUMENT.**— A count in an information that charges the forgery of a deed, and also the uttering of the forged deed, is bad for duplicity.¹
3. **EVIDENCE — COMMUNICATIONS MADE TO COUNSEL.**— Professional communications are not privileged, when such communications are for an unlawful purpose, having for their object the commission of a crime.¹
4. **TESTIMONY OF CO-RESPONDENT.**— Where parties are jointly indicted or informed against, and one chooses a separate trial, he cannot force a co-respondent to testify without his consent or request.

Exceptions from Hillsdale.

Information for forgery. Respondent was convicted below. Exceptions overruled.

Moses Taggart, attorney-general, for the people.

E. L. Koon, Geo. Knickerbocker, Alpheus St. John and Bean, Underwood & Lane, for respondent.

CHAMPLIN, J. The respondent, Charles Van Alstine, was convicted in the circuit court from the county of Hillsdale upon an information charging him, jointly with Charles A. Parker and Edward C. Cleveland, with the forging and uttering of a deed of forty acres of land, lying in the township of

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Somerset, in Hillsdale county. The deed purported to be executed by Eleanor Van Alstine, in the presence of Parker and Cleveland, and acknowledged by the grantor before Parker, as a notary public of Lenawee county. It bears date the 9th day of May, 1876. The legal title to the land at the date of the deed was in Eleanor Pelton. It was claimed by the prosecution that she was one and the same person with Eleanor Van Alstine. She had for several years lived with the respondent, Van Alstine, and the evidence showed that he treated her as his wife, and claimed her to be such; that she had united with him in the execution of a deed of land as Eleanor Van Alstine, although she was never married to him by any formal ceremony, and her estate was administered after her death, which occurred in August, 1876, as the estate of Eleanor Pelton. She left as heirs at law two sisters, a Mrs. Giddings and a Mrs. Wescott. She died testate, and her will was admitted to probate in Hillsdale county, an executor appointed, her estate appraised, and the ordinary steps taken to administer her estate. At the time the executor made his inventory, the title of record to the southeast quarter of the northwest quarter of section 26, township 5 south, range 1 west, being in the town of Somerset, county of Hillsdale, appeared to be in Eleanor Pelton, and he included it in his inventory as property belonging to the estate. Afterwards, and in 1876, the respondent, Van Alstine, placed upon record in the office of the register of deeds for Hillsdale county a quitclaim deed of said lands, bearing date May 9, 1876, and purporting to have been executed by Eleanor Van Alstine to him, in the presence of the other two respondents. It is claimed by the prosecution that this deed was forged by the respondent. The case comes here upon exceptions before judgment.

The information contains ten counts. Counsel for respondent insists that the first nine are not sufficient upon which to convict the defendant, for the reason that they contain no allegations that Eleanor Van Alstine had any interest in the land. Forgery was a misdemeanor at the common law. From the earliest times in the history of the criminal law of England statutes have been passed upon the subject. As early as 1413 a statute (1 Hen. V., ch. 3) was enacted which recited that many persons had been deprived of their property by false deeds,

wherefore it was enacted "that the party so grieved shall have his suit in that case, and recover his damages; and the party convict shall make fine and ransom at the king's pleasure." Again, the English statute of 5 Eliz., chapter 14, section 2, prohibited the making or forging of any false deed, etc., "to the intent that the state of freehold or inheritance of any person in lands, etc., shall not be molested, troubled, defeated, recovered, or changed;" and the third section fixes a penalty for any person to forge or make any false charter, deed or writing, to the intent that any person shall have or claim any estate or interest for term of years of, in or to any lands. The forgery of deeds was made felony, without benefit of clergy, by 2 Geo. II., chapter 25. The precedents framed under the English statutes, and especially those under the second section of 5 Eliz., chapter 14, on account of the particular phraseology of the enactments, uniformly set out the title of the party whose estate in the land was intended to be molested. 2 Starkie, Crim. Law, 481; 3 Chit. Crim. Law, 1062. The necessity of doing so is apparent from the provisions of the law. It is an essential ingredient of the offense, and must therefore be stated.

But our statute is more broad and general in its terms. It provides that every person who shall falsely make, alter, forge or counterfeit any deed with intent to injure or defraud any person, shall be punished, etc. (How. St., § 9213); and section 9226 provides that in any case where an intent to defraud is required to constitute the offense of forgery, or any other offense that may be prosecuted, it shall be sufficient to allege in the indictment an intent to defraud, without naming therein the particular person or body corporate intended to be defrauded, and on the trial of such indictment it shall be deemed sufficient, and shall not be deemed a variance, if there appear to be an intent to defraud the United States, or any state, county, city or township, or any body corporate, or any public officer in his official capacity, or any copartnership or member thereof, or any particular person. There is no statutory definition of forgery. At the common law it is defined to be the "making of a false document with intent to defraud;" and the offense may be said to be complete when any person falsely makes any of the writings enumerated in the statute

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"with intent to deceive in such a manner as to expose any person to loss or to the risk of loss."

There is such a marked difference between the English and our statutes upon the subject, that neither precedents nor decisions based upon the former can be of service or authority under the latter, which, as we have seen, does not limit the operation of the statute to persons having interests in the same or other lands; and to so limit it would seem to be in direct contravention of the statute — would greatly narrow its operation, and defeat its most important objects. It is apparent, upon the most cursory consideration, that fraud by means of a false or forged deed may be perpetrated, not only upon the owner of the land, but upon strangers to the title who are induced to rely upon the genuineness of the forged deed to advance or loan money upon the faith of the legal validity of such instrument. It was long ago held that a person could be guilty of forgery in signing his own name to a deed of land which he had already conveyed, when he antedated the instrument for the purpose of defrauding. 2 Russ. Cr., pp. 322, 323. In this view of the statute it can neither be necessary nor advisable to set out in the information the title of the person intended to be defrauded, nor in what the forgery consisted. It is not necessary, for the reason that such facts are not essential ingredients of the offense. I do not consider it advisable as a matter of general practice to do so, because, if stated, the proof must correspond with the averment, or the defendant must be acquitted. 2 East, Crim. Law, 988.

It was said in *People v. Marion*, 28 Mich., 255, that it is proper to set out, in at least one count of the information, with particularity, in what the forgery consisted; but the public prosecutor is not obliged to do so, and when he does, it is done *ex mera gratia* to the accused. I do not think it necessary that the information should contain any averment that Eleanor Van Alstine had any interest in the land at the time it is claimed the forgery was committed. The gist of the offense is the intent to defraud. The validity of the objection depends entirely upon the effect and operation of the statute upon which it is founded, and it is usually sufficient if the information is so framed that the offense is described in the words of the statute, or according to its legal effect and operation. Where

the instrument alleged to have been forged is one enumerated in the statute, and appears to be complete on its face, to be effectual all that is necessary is to aver that the act was done with intent to defraud. But how and in what manner the party was to be defrauded is no ingredient of the crime, but is mere matter of evidence, which all the authorities agree need not be set out in the information. *West v. State*, 22 N. J. Law, 212; Archb. Crim. Proc., 23, 194; 2 East, Crim. Law, p. 989, § 59; *The King v. Powell*, 2 W. Bl., 787; *Taylor's Case*, 1 Leach, 215; *Rex v. Goute*, 1 Ld. Raym., 737.

The land which this deed purported to convey had an actual potential existence, definitely described and located, and the deed on its face appeared to work some effect upon the property, and was complete in itself for that purpose. It did not require the aid of averments of extrinsic facts to render its deception complete. I do not think the distinction which counsel for respondent seeks to raise between executed and executory contracts exists. The test whether the party can be guilty of a forgery does not consist in determining whether the instrument forged, if genuine, would be of any force or effect. A draft, falsely made, is no less a forgery because the drawee has no funds, and is under no obligation to pay if the draft had been genuine. A deed falsely made by a grantor, after he had conveyed all interest in the land, is no less a forgery because, if genuine, it would convey no title. Forgery may be committed when the name forged is fictitious, and I can see no reason why it should be necessary to aver what interest the alleged grantor, whose name is forged, had in the land described in the deed. In some cases it would be immaterial, and in others mere matter of evidence, bearing upon the intent to defraud, as it is in this case.

The seventh and eighth counts were each objectionable on the ground of duplicity. Each charges the respondents jointly with the offense of forgery. The seventh charges them also with the offense of uttering the forged deed, while the eighth charges Van Alstine alone with uttering it. This is uniting two substantive offenses in the same count, and is not permissible. It is claimed that the ninth count is bad for duplicity, but I do not think it is open to this objection. It charges the respondents jointly with forging the deed and certificate, details

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the particular manner wherein the forgery consists, and then avers that Van Alstine falsely caused the deed to be recorded. I do not agree with counsel for respondent that this was an effort to charge that Van Alstine uttered the deed knowing it to be a forgery. It is rather directed to the scheme of all three to defraud, and bears upon the question of intent. It is, in other words, an allegation of an act showing the intent of the parties charged with the forgery. The tenth count is a compliance with the suggestion of Judge Christianey in *People v. Marion*, 28 Mich., 255, and is as follows:

"And the said prosecuting attorney of said county, prosecuting as aforesaid, further gives the court now here to understand and be informed, that heretofore, to wit, on the 25th day of August, A. D. 1876, at the township in the county of Hillsdale aforesaid, one Eleanor Van Alstine died seized of certain real estate, situate in the township of Somerset aforesaid, in the county aforesaid, and known and described as the southeast quarter of the northwest quarter of section 26, town 5 south, range 1 west, and that afterwards, heretofore, to wit, on the 16th day of April, A. D. 1877, at the township of Somerset, in the county aforesaid, Charles Van Alstine, Charles A. Parker and Edwin C. Cleveland did falsely and feloniously make, forge and counterfeit a certain paper writing, being or purporting to be a deed or conveyance from the aforesaid Eleanor Van Alstine to the said Charles Van Alstine of the aforesaid described lands, situate in the township of Somerset, in said county, and did then and there falsely and feloniously make, forge and counterfeit on the back of the aforesaid deed or conveyance a certain other paper writing, being or purporting to be a certificate of acknowledgment of the execution by the said Eleanor Van Alstine of the aforesaid deed or conveyance from the aforesaid Eleanor Van Alstine to the said Charles Van Alstine before the said Charles A. Parker, a notary public in and for the county of Lenawee, and state of Michigan, which said deed or conveyance was of a nature proper to be recorded according to the law; and the same, together with the said certificate of acknowledgment, afterwards, to wit, on the 16th day of April, A. D. 1877, was duly recorded in the office of the register of deeds in and for the county of Hillsdale and state of Michigan, in Liber 72 of

Deeds, on page 611, with intent to defraud, contrary to the form of the statute in such case made and provided," etc.

Against this count it is urged (1) that respondent could not be convicted under it because the evidence showed that the title of the land was in Eleanor Pelton; (2) if it should be held good, there is no proof that the forgery was committed in Hillsdale county. Neither objection can be sustained. The evidence showed that Eleanor Pelton and Eleanor Van Alstine was the same person, and, so far as that became material, the evidence, both from the witnesses of the people and the respondent, tended to prove that fact. The evidence also tended to prove that the forgery charged was committed in Hillsdale county. It was testified to by Mr. Pease that respondent told him that the deed was made out at his house in the spring or forepart of summer, 1876, at Somerset, Hillsdale county. At this time he showed witness the deed, which the witness identified as the one charged in the information to be a forgery. Respondent had previously shown this deed to the witness Mercer, on town-meeting day, 1877, at the hotel in Somerset Center, and finally the respondent's witnesses testify that the deed in question was made and executed at respondent's residence in Somerset.

The other errors alleged pertain to the rulings of the court upon the trial, and to the charge of the court and his refusals to charge. The exceptions taken upon the trial were numerous, but I shall only discuss those referred to in the brief of counsel for respondent, and which they have considered of sufficient importance to call our attention to. The first relates to the testimony of Thomas J. Hiller. It appeared from his testimony that he was a practicing attorney at Hudson; that he had known respondent for fifteen years or more, but had never been engaged by him in any professional capacity. He testified that he had a conversation with respondent; that respondent did not ask him professionally about his legal rights in connection with that statement; that he at no time told him in any shape that he wanted to employ him; that in this conversation a statement was made to him by respondent, and certain questions asked with regard to it, and upon which facts he gave him an opinion, but respondent gave no intimation

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that he wanted his assistance at all. The counsel for respondent objected to the witness stating the conversation, on the ground that it was privileged. The objection was overruled, after counsel for the people stating to the court what he expected to prove by the witness; and the witness, after fixing the date of the occurrence as December, 1876, testified as follows:

"I cannot give the exact language, but I can give the substance of it, and I think nearly the language. He came into my office and said, 'Squire, I want to talk to you.' I stepped from the desk where I was writing, and we stepped into the back room, and he took a chair and sat down in front of me, and I said, 'Charlie, what is it?' He said: 'Some years ago my wife and I bought forty acres of land up thero and took the title in her name. I paid all, or nearly all, that has been paid on it. There was an agreement between her and me when certain family matters were arranged she should deed the property to me. She is now dead. The deed never has been made, and I have not a scratch of a pen to show for it. Now, can I have a deed made out of the piece of land from her to me and put on record?' I replied, 'No, sir.' He said, 'Why?' I replied: 'Because it would be forgery.' He said: 'How forgery?' I replied: 'Because you change the channel of the title in it. It now goes by her heirs, and you would change it to yours. Besides, if some one should write her name on the deed and she is not here to acknowledge it'—He replied: 'Yes; but deeds are often made and not acknowledged for a long time afterwards.' 'I am aware of that, Charlie,' I replied, 'but the law requires the officer to put the exact date of the acknowledgment on the instrument, and unless it purports to be acknowledged prior to her death, it would not be good for anything on its face.' And I said further that 'there is not any man in the world that can touch that deed with anything like safety.' After I said that I walked out of the room and he followed me. He walked down to the door and I stepped around behind my table, and I faced him. He said to me, 'Squire, then you think it can't be done?' I replied, 'Charlie, I know it can't be done.' And he went away. That is the substance of the conversation between him and me,

about as it occurred. I have had no conversation with him since about it."

The counsel for respondent then moved to strike out the testimony, on the ground that it was privileged, which motion the court overruled. The counsel insists that this was error, and in support they cite us to *Alderman v. People*, 4 Mich., 414-422; *Hamilton v. People*, 29 Mich., 173, and *Passmore v. Passmore*, 50 Mich., 626. These cases lay down the rule, everywhere recognized, that the privilege is the privilege of the client, and not of the attorney, and may be waived by him. But there are exceptions to the general rule, based upon public policy and public security. Professional communications are not privileged when such communications are for an unlawful purpose, having for their object the commission of a crime. They then partake of the nature of a conspiracy, or attempted conspiracy, and it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes. The privilege does not exist in such cases. 1 Gilb. Ev., 277; *Greenough v. Gaskell*, 1 Mylne & K., 98; *Coveney v. Tannahill*, 1 Hill (N. Y.), 33; *Bank of Utica v. Mersereau*, 3 Barb. Ch., 528; *People v. Blakeley*, 4 Parker, Crim. R., 176; 1 Whart. Crim. Law, § 773; Roscoe, Crim. Ev., 150.

Defendant's counsel claims that it was error to exclude the testimony of Seton Flint as to Maple's deed. The defense asserted that the deed in question was the genuine deed of Eleanor Van Alstine, and counsel for respondent produced a witness who testified that she was present at Van Alstine's in May, 1876, and was engaged in making a dress for Eleanor; that respondents Potter and Cleveland came to Van Alstine's on that occasion, and some papers were drawn and were executed by respondent and Eleanor, and she was requested to sign her name as a witness, which she did. A deed was shown her from Charles Van Alstine and Eleanor Van Alstine to respondent Cleveland of a parcel of land, which she identified as the

one she witnessed. She also testified that, shortly after, Eleanor Van Alstine was requested to come from the room where Eleanor and she were and sign a deed; that the door was open, and she saw her take up the pen and write; that she asked her when she returned to the room what paper it was, and she told her that it was a deed of her forty acres to Charles; that they had arranged it so that whichever should die first the other should have the property belonging to the other; that after Potter and Cleveland went away, she saw respondent and Eleanor comparing this paper she had signed with a deed they had of Walters; that a short time before Eleanor died, and during her last sickness, she gave this deed to witness, with instruction that, in case of her death, she should deliver it to Charles, but, if she got well, to return it to her; and she identified the deed in question as the one so handed to her. This deed from respondent and Eleanor to Cleveland was produced and read in evidence, and it was claimed that before the deed was executed to Cleveland, Van Alstine had agreed to convey the same land to one Maple, and did actually execute the deed, but that the trade fell through; and the witness Flint was interrogated as to the execution of this prior deed. The testimony was rightfully excluded, as was that of Swartwout with regard to Cleveland's possession of this land, and other testimony concerning the Cleveland deed. It was all foreign to the inquiry respecting the genuineness of the deed from Eleanor to respondent, and could have no bearing upon the truth or falsity of the latter instrument. It would not have been error to have excluded all evidence of the deed to Cleveland. *Vinton v. Peck*, 14 Mich., 287.

Witnesses were permitted to testify that the signature of Eleanor Van Alstine to the deed from Charles and Eleanor to Cleveland was in the handwriting of respondent. This is claimed as error. This testimony came into the case in this way: The respondent had introduced both the deed from Charles and Eleanor Van Alstine to Cleveland and from Eleanor Van Alstine to respondent, in evidence as genuine papers. The public prosecutor then called the attention of witnesses to the signatures of these deeds, and inquiry was made whether these signatures were all written by the same person; also, whether they were not all in the handwriting of

respondent; also, whether they were in the handwriting of a woman.

I do not think any error was committed in admitting the testimony under the circumstances in which the questions arose. The circumstances were peculiar. The deed claimed to be forged was shown to be in the possession or under the control of the respondent. He had been notified to produce it. He chose not to do so until he came to the introduction of testimony in his defense. The people, in the meantime, were compelled to rely upon secondary evidence to sustain the prosecution. The person whose name it was claimed was forged was dead. The people had made as full proof as they could do under the circumstances, and after the deed had been produced by respondent with a claim of its genuineness, the only way they could attack it was by testimony going to show that the signature was not that of Eleanor Van Alstine, and I think the testimony was legitimate and proper for that purpose. Neither do I think it tended to rebut the testimony of Loury (a witness for the prosecution) as to admissions or statements made by the respondent, that he had no deed of the premises from Eleanor, to show by another witness that on another occasion he claimed to have a deed.

Witnesses were permitted to testify that, at the time of the appraisal of the property belonging to the estate of Eleanor Pelton, the land in question was entered upon the inventory as the land of the deceased, and was talked of as her property in the presence of respondent, and he made no claim thereto. This testimony was relevant. How much weight it might eventually be entitled to would doubtless depend upon its relation to other testimony in the case. One of the persons then present testified that the respondent claimed to him that some \$400 of his money had gone into the purchase of the land, and made some inquiry as to whether he could present it as a claim against the estate. Complaint is made that the prosecutor claimed that the deed from Charles and Eleanor Van Alstine was also forged. I think the course pursued was justified by the case of *Perkins v. People*, 27 Mich., 386.

The respondent's counsel proposed to swear as witnesses Charles A. Parker and Edward Cleveland, who were jointly informed against, and who had not yet been tried, acquitted or

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discharged. The prosecuting attorney objected to their being sworn, for the reason that they were charged under the same information, and neither had been acquitted or discharged or convicted under that charge. The court sustained the objection. No question is made that they were not competent witnesses at the common law; but it is claimed here, but not in the court below, that they are competent under section 7544, Howell's Statutes. Section 7544 of Howell's Statutes provides "that no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same as a party or otherwise. . . . Provided, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness." The objection made was aimed at their common-law disability. The statute has removed this disability only in certain cases mentioned in the proviso of the statute. Where parties are jointly indicted or informed against, and one chooses a separate trial, he cannot force a co-respondent to testify without his consent or request. No offer or suggestion was made in this case that the witnesses were competent under the statute, or had consented or requested to be witnesses. The court was not in any manner informed that the witnesses were qualified by having made the request. Such request should be made to the court, otherwise it is the duty of the court to protect them in the privilege which the law accords to them of not being obliged to criminate themselves. The request must proceed from the party charged. No one has the right to ask them to be sworn and put them upon their refusal. The impropriety of such course is apparent, and no request can be implied, in the absence of one appearing upon the record. These parties were not upon trial in this case, and consequently were not represented there by attorneys. Had they been upon trial, and their attorney had offered them as witnesses, it might have been considered as a request made by them. The objection was rightly overruled.

Numerous requests to charge, and exceptions to the charge as given, were made. I have carefully considered all of them, and while I can see that some parts, isolated from the context, or selected out of the charge as given, would be error, yet when the whole is taken together, the law, as applicable to the facts, is correctly given. Objection was made to the reception of

photographic copies of that portion of the deed which embraced the signature of the grantor, and of comparisons of handwritings instituted therewith. These were introduced before the original was put into the case, and we do not feel called upon to pass upon the correctness of the rulings made in reference thereto, as they become unimportant after the introduction of the original in evidence.

The exceptions are overruled, and the court below is advised to proceed to judgment.

(The other justices concurred.)

NOTE.—*Joinder of offenses.*—In *People v. Sweeny*, 55 Mich., 586, it is held that an "assault with intent to murder," and an "assault with intent to do great bodily harm, less than the crime of murder," may be joined in the same information in different counts. When distinct offenses are charged in different counts, but are committed by the same acts at the same time, and the same testimony must necessarily be relied upon for conviction, the prisoner cannot be confounded in making his defense, and the people ought not to be compelled to elect between the counts. See *Com. v. Miller*, 5 Am. Cr. R., 299; also, *State v. Shaffer*, 4 Am. Cr. R., 83. As to when communications to counsel are not privileged, see *The Queen v. Cox and Railton*, 5 Am. Cr. R., 140, where the matter is elaborately discussed.

STATE V. WILLIS, JR.

(78 Me., 70.)

GAMBLING: *Indictment — Name of prosecutor — Setting out lottery ticket.*

1. **QUI TAM ACTION — PLEADING.**—It is not necessary that an indictment for the recovery of a penalty shall disclose the name of the prosecutor, even though he is to share such penalty.
2. **GAMBLING — LOTTERY — INDICTMENT.**—A count in an indictment which alleges that the respondent was engaged in "a lottery, scheme or device of chance" is not bad for duplicity, nor is it bad for the same reason if it alleges that the respondent "was concerned in a lottery by printing and circulating an advertisement of it, and also in other ways."¹
3. **ADVERTISING LOTTERY.**—A count alleging that the respondent caused a lottery advertisement to be inserted in a paper published out of the state, and circulated within the state, is bad unless it also alleges that the respondent had something to do with such circulation.

¹See note.

4. SELLING LOTTERY TICKET.—An indictment for being unlawfully concerned in a lottery “by selling to one H. M. one ticket” is good in that respect, the words “then and there” selling being immaterial in the class of inferior cases to which that offense belongs.
5. SAME—SETTING OUT TICKET IN INDICTMENT.—A lottery ticket may be set out in an indictment by copy, and if it does not appear on its face to be a ticket, it may be alleged and proved as such.

On exception from the Superior Court.

W. T. Haines, county attorney, for the state.

H. M. Heath, for defendant.

PETERS, C. J. The defendant demurs to an indictment which alleges against him participation in a lottery nuisance. It is objected that it is not stated either in or upon the indictment who the prosecutor is. The law apportions the penalty between the prosecutor and the town where the offense is committed. If the law was ever critical enough to destroy an indictment because it did not disclose the name of the prosecutor or informer, when such an averment requires no proof, and has nothing to do with the guilt or innocence of the person prosecuted, it was intended by the decision in *State v. Smith*, 64 Me., 423, to dispense with such useless technicality.

It is contended that each count is ill for duplicity, because the allegation is that the defendant was engaged in “a lottery, scheme, or device of chance.” There is no contradiction in the terms. They are descriptive of only one thing—the pleader trying to describe the offense by as apt a word as possible. The word “lottery” has no technical meaning. A lottery is nothing more nor less than a scheme or device of chance. *People v. Noelke*, 94 N. Y., 137.

The indictment avers that the defendant was concerned in a lottery by printing, publishing and circulating an advertisement of it, and also in other ways. It is argued that this is ill for duplicity. The argument is based upon a misconception of the design and scope of the law against lotteries. The statute (R. S., ch. 128, § 13) does not establish numerous independent offenses—it establishes but one offense. It declares “every lottery, scheme or device of chance” to be a nuisance. The offense to be alleged and proved is nuisance. The statute particularizes some of the modes in which the offense may be

committed, and also declares generally that whoever aids in a lottery, or is connected therewith, shall be punished. It is but one offense, and the same punishment, no matter in what form the guilty participation consists. There are not as many distinct offenses as there may be forms of the offense. The indictment describes the means by which the defendant's guilt may be proved. The same rule applies as in indictments for liquor nuisances. *State v. Lang*, 63 Me., 215; *Com. v. Harris*, 13 Allen, at page 539.

The indictment gives the nature of the scheme by setting out the advertisement by copy — by allowing it to speak for itself. This mode of pleading is not unusual; but it is denied by counsel that the paper indicates a game of chance. It is contended that the word "chance" in the paper means "opportunity." We do not concur in this interpretation. It is conceded that the careless reader might see in the advertisement a game of chance, but that would be so only because the meaning is there to be seen. In such case the reader gets the author's real meaning, which must be the same for all persons. However disguised by indirect or deceptive expression, the paper, as a whole, discloses a lottery. If it were not so readers would not become buyers. It informs its patrons that every subscriber is sure to get a present, and the presents are of various values. Assurance is given that the presents will be "awarded fairly." How can presents of unequal value be fairly awarded unless by some lot or chance? A purchaser or subscriber receives for his money "a numbered receipt." What can be the purpose of numbers if all numbers are favored alike? Each number will take "a prize," and has "a chance to win" a very valuable one. Of course all cannot win the highest prize or present. It is not an opportunity to win, so much as it is an opportunity for a chance to win. It is not any easy thing for a notice to have the effect of advertising vice to one and virtue to another.

The first count in the indictment may not be good. It alleges defendant's complicity in the nuisance to consist of a notice inserted in a newspaper published in New York. It charges that the newspaper was circulated in Augusta, but it is not said when or by whom, or whether the defendant had any knowledge of that fact or not. See *State v. Paul*, 69 Me., 215.

The remaining counts are sufficient. The most of an ob-

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jection is that the words "then and there" are not employed in them. The use of the phrase would have made the declaration more finished. The second count charges that the defendant, at Augusta, on a day named, was unlawfully concerned in a lottery (described), "by selling to one Harry May one ticket," and so on. It is contended that, to be correct, it should read "by then and there selling" the ticket described. In a capital case the omission would probably be considered fatal. But the rule requiring time and place to be repeated to the traversable averments is not so much regarded in indictments for inferior offenses as in cases where the life of the prisoner is in danger. 1 Bish. St. Proc., § 413, and cases. The sense here is by no means uncertain. There would be more ground for the objection if a series of distinct overt acts were alleged, all essential to the commission of the offense. *Com. v. Doherty*, 10 Cush., 52. The words "then and there" need not be repeated to an averment which merely declares a legal conclusion. The averment of being concerned in a lottery was of that nature, although preceding other allegations, the potent fact being the sale of a ticket. *Com. v. Sullivan*, 6 Gray, 477; *Com. v. Langley*, 14 Gray, 21.

In the last counts the ticket is set out in its own words. It may not on its face appear to be a ticket. Still it may be proved to be such. It is averred that it is a ticket. The advertisement proves it. *State v. Ochsner*, 9 Mo. App., 216.

Demurrer sustained as to first count only.

WALTON, DANFORTH, LIBBEY, EMERY, and FOSTER, JJ., concurred.

NOTE.—In *Com. v. Hogarty and others*, 141 Mass., 106, the defendants were indicted under the statute for "being present at a gambling game," and the evidence tended to show they were engaged in playing a gambling game. *Held*, that they were also "present" and that the indictment was not defective.

THE STATE V. WINEBRENNER.

SAME V. McMAHON.

SAME V. BEECHER.

SAME V. RUBURG.

(87 Ia., 230.)

GRAND JURY: *Term of court — Indictment — Duplicity.*

1. GRAND JURY—INDICTMENT—TERM OF COURT.—A grand jury legally drawn and summoned for the year of 1884, on January 7, 1885, found an indictment against defendant; the term of court at which the indictment was found commencing on December 8, 1884, and, so far as the record showed, not having terminated. *Held*, on motion in arrest of judgment, that the indictment was valid.¹
2. INDICTMENT—DUPLICITY.—An indictment charging defendant with keeping a place for the unlawful sale of liquor, and allowing gambling and drunkenness therein, and of selling liquor therein to minors, habitual drunkards, and intoxicated persons, to the disturbance of others and contrary to law, is not bad for duplicity.

Appeals from Marshall District Court.

Indictments charging the defendants as follows: "The grand jury of the county of Marshall, in the name and by the authority of the state of Iowa, accuse John C. Winebrenner of the crime of nuisance, committed as follows: The said John C. Winebrenner, on the 4th day of July, 1884, and on divers other days prior to the finding of this indictment, and since said day, in a building owned by Albert Sharp, on the south one hundred feet of the east one-third of lot 7 and block 9, in the town of Marshall, in the county aforesaid, wrongfully and unlawfully did erect, continue, and use a certain building and place commonly known as a 'saloon,' in which said building and place the said John C. Winebrenner did keep intoxicating liquors, to wit, whisky, rum, gin, brandy, ale, beer, wine, alcohol, bitters, and mixed drinks, with intent then and there to sell the same in said building and place in violation of law; and at said time and place, and in said building, the said defendant did habitually and repeatedly keep and sell, in the state of Iowa, beer and other intoxicating liquors contrary to law; and at said time and place, and in said building, the said defendant did allow and permit gambling, fighting, drunkenness

¹See note.

and other breaches of the peace, and the same were then and there carried on by and with the consent of the defendant, to the disturbance of others; and said defendant, in said building and place, at said time, did habitually and repeatedly sell ale, beer, wine and intoxicating liquors to minors and intoxicated persons, and to those in the habit of becoming intoxicated, to the disturbance of others and contrary to law." The defendants severally pleaded guilty, and filed a motion in arrest of judgment, which was overruled, and judgment being rendered, they severally appeal.

Parker & Childs, for appellants.

A. J. Baker, attorney-general, for the state.

SEEVERS, J. 1. The record in the foregoing cases and the questions to be determined are precisely the same, and therefore but a single opinion is required. The first ground in the motion in arrest of judgment is that the indictment was found on the 7th day of January, 1885, by a grand jury drawn, selected and summoned for the year 1884. The term of court at which the indictment was found commenced on the 8th day of December, 1884, and as the record fails to show anything to the contrary, it must be assumed the term continued until the finding of the indictment. The statute provides that a list consisting of seventy-five persons shall annually be made, from which to select grand jurors for the year, commencing on the 1st day of January. The grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the 1st day of January in each year, and shall serve for one year. Code, §§ 234, 239.

The grand jury in the case at bar, when impaneled, was a legally constituted body. Now, does it cease to be such before the adjournment of the term? If so, there must be a statute which in terms so declares, because in contemplation of law the whole term is considered as but one day. 2 Bouv. Law Dict., 787. The statute in terms provides that the grand jurors shall be selected for the first term in the year at which jurors are required, commencing next after the 1st day of January in each year. The jurors so selected cannot act as such until that time or term. They serve for one year, or until the cor-

responding term in the succeeding year. Owing to a change in the statute, *State v. Delong*, 12 Iowa, 453, is no longer applicable.

2. The next ground urged in arrest of judgment is that two offenses are charged therein. The indictment is substantially the same as in *State v. Dean*, 44 Iowa, 648, and following that case we hold that the indictment in this case is not bad for duplicity.

Affirmed.

NOTE.—*Grand jury.*—In *De Olles v. The State*, 20 Tex. Ct. App., 145, it is held: If an indictment recites upon its face that it was presented in the district court of the proper county and state, by the grand jurors of said county, duly elected, impaneled, sworn and charged as such, the presumption obtains that it was presented by a legal grand jury of the proper county, and to prevail against such presumption it devolves upon the defense, in its motion to set aside the indictment, to satisfactorily show that, in fact, the indictment was not the act of a legal grand jury of the county; and to do this, it is not sufficient to show merely that there is no entry upon the minutes of the court formally reciting the organization of the grand jury.

Indictment is not vitiated by the omission to enter upon the minutes of the court the organization of the grand jury which presented it, although correct practice requires the entry of such proceeding.

Before the trial was entered upon in this case, the trial court, upon the motion of the district attorney, caused to be entered upon the minutes *none pro tunc*, the proper entry showing the organization of the grand jury which presented the indictment, and that the said grand jury was the legal and duly qualified grand jury of the proper county. *Held correct.*

PEOPLE V. GUSTIN.

(57 Mich., 407.)

HOUSE OF ILL FAME: *Disorderly persons — Repeal of statute.*

Howell's Statutes of Michigan, section 9286, prescribing the punishment of a person keeping a house of ill fame, is not repealed by act 130 of the public acts of 1883, relating to disorderly persons.¹

Error to St. Clair.

Moses Taggart, attorney-general, for the people.

John H. Mitchell, for respondent.

¹ See note.

COOLEY, C. J. The information on which the respondent was convicted charged that on the 1st day of November, in the year 1884, at the township of Port Huron, in said St. Clair county, and on divers other days and times between that day and the 1st day of March, 1885, at the township aforesaid, he did unlawfully keep and maintain a certain house of ill fame, resorted to for the purposes of prostitution and lewdness, contrary to the form of the statute, etc. The judgment upon this conviction was that the respondent be confined in the house of correction at Ionia for a period of nine months. The statute under which the conviction took place is the following: "Every person who shall keep a house of ill fame, resorted to for the purpose of prostitution or lewdness, shall be punished by imprisonment in the county jail not more than one year, or by fine not exceeding \$300." R. S. 1846, ch. 158, § 10; How. St., § 9286.

The respondent contends that this statute was repealed by implication in the passage of act 136 of 1883 (Pub. Acts, p. 141), the first section of which enumerates the classes of persons who are to be deemed disorderly persons, and specifies, among others, "all common prostitutes; all keepers of bawdy-houses or houses for the resort of prostitutes; all drunkards, tipplers," etc. The second section prescribes the punishment on conviction of being a disorderly person, which on a first conviction is not to exceed \$50 fine, with costs of prosecution, or three months' imprisonment. This, it is said, covers the ground of the other statute, and, being subsequent in time, necessarily repeals it. Repeals by implication are not favored. *Brown v. McCormick*, 28 Mich., 215; *Breitung v. Lindauer*, 37 Mich., 217; *Gordon v. People*, 44 Mich., 485; *Patrick Ryan's Case*, 45 Mich., 173. The question of repeal is largely one of intent, and if the two statutes can stand and both have effect, they must be allowed to do so.

No words are made use of in the act of 1883 expressive of an intent to repeal the statute first above recited. The purpose to repeal, if it existed, must therefore be found in the fact that it seems to provide for the punishment of the same criminal conduct. It will be seen, however, that the offenses punished under the two statutes are, in designation at least, different, the one being the offense of being keeper of a house

of ill fame, and the other the offense of being a disorderly person. It may be plausibly suggested that it was intended that the same conduct might, at the discretion of the prosecuting officer, be punished under either designation, as the case should seem to require. The same statute also enumerated among disorderly persons "all persons knowingly selling or giving intoxicating liquors to drunkards or tipplers or other disorderly persons," though it seems highly improbable that it was intended to repeal other legislation on that subject.

On the question whether one statute was intended to be left unaffected by another, it is sometimes well to examine the history of legislation on the subject or subjects to which they refer. In this case it will be found particularly useful. The statute above recited, for the punishment of keepers of houses of ill fame, first appears as part of the Revision of 1838, p. 647, and has been continued in force from that time to the present without any alteration whatever. But the Revision of 1838 also contained a chapter "Of Disorderly Persons," with an enumeration similar to that of the act of 1883; "all keepers of bawdy-houses or houses for the resort of prostitutes" being specified among others.

As the Revision was adopted as one act, no question can be made of the purpose that the whole should have effect. It is true that the leading purpose of the chapter on disorderly persons was to provide for their being required to give security for their good behavior; but it contained provisions under which they might be imprisoned at hard labor. R. S. 1838, p. 201. Like provisions are found in the Revised Statutes of 1846, p. 182, and these were carried into the compilation of 1857, p. 493, and, with a slight change in 1865, not material to the present subject, into that of 1871, p. 644, and of 1881. How. St., § 1985. And the act of 1883 is, by its title, "An act to amend chapter 53 of the Compiled Laws of 1871, relative to disorderly persons," which chapter 53 is chapter 39 of the Revised Statutes of 1846, slightly amended in 1865, as above stated.

This history of legislation makes it perfectly evident that a legislative purpose has existed in this state from the very first to make the keepers of bawdy-houses liable to be dealt with as disorderly persons, though they were expressly made punish-

able under the proper designation of their offense. A change, therefore, in the statute specially aimed at disorderly persons, as such, affords no ground for an inference of an intent to change the statute for the punishment of keepers of houses of ill fame as such. The legislative purpose that the enactments on the one subject should be unaffected by those on the other has been manifest in all the legislation from 1838 to the present day. There is no error in the record and the conviction must stand affirmed.

(The other justices concurred.)

NOTE.—*Repeal of statutes by implication.*—In *United States v. Claflin*, 7 Otto, 546, it is said: "The principles of legal construction to be applied to such a case are well known. While repeals by implication are not favored, and while it is held that a statute is not repealed by a later one containing no repealing clause, unless the later statute is positively repugnant to the former, or is a plain substitute for it, supplying its provisions, it is still true that repeal or no repeal, substitution or no substitution, is a question of legislative intention, and there are acknowledged rules for ascertaining that intention.

"In *Mitchell v. Brown*, 1 El. & El., 267, it was ruled in the court of queen's bench, that if a later statute again describes an offense created by a former statute, and affixes a different punishment to it, varying the procedure, etc., the latter operates by way of substitution, not cumulatively, and the former statute is repealed. A similar rule was asserted by Baron Bramwell in *Ex parte Baker*, 2 H. & N., 219. So in *Barry v. The Croydon Gas Co.*, 15 C. B., N. S., 568, an act imposing a penalty of £200 upon the undertaker of any gas-works for fouling any stream, etc., to be recovered by the person into whose water the foul substance should be conveyed, was held to repeal by implication a former act describing the same offense and imposing the same penalty, to be sued for by any common informer. The two penalties were held not to be cumulative. The principle of these rulings has been frequently recognized by courts in this country.

"In *Norris v. Crocker et al.*, 13 How., 429, it was said by this court, 'As a general rule, it is not open to controversy, that, where a new statute covers the whole subject-matter of an old one, adds offenses and prescribes different penalties for those enumerated in the old law, the former is repealed by implication, as the provisions of both cannot stand together.' That was a case in most points much like the present. The older statute had imposed a penalty for certain offenses,—namely, obstructing a claimant in arresting a fugitive from labor, rescuing the fugitive after his arrest, or harboring and concealing him with knowledge that he was a fugitive; and the statute had enacted that the claimant might recover the penalty for his own benefit, and also reserve to him a right of action in damages for the actual injuries he might have sustained, be they more or less. The later statute imposed a greater penalty, and added imprisonment for the same

offenses, gave no right to the claimant to recover the penalty, but gave him a right to recover by way of damages the sum of \$1,000 for each fugitive lost by reason of the offenses. This court held that the two statutes were in conflict, and consequently that the earlier was repealed.

"It is, however, necessary to the implication of a repeal that the objects of the two statutes are the same, in the absence of any repealing clause. If they are not, both statutes will stand, though they may refer to the same subject. Maxwell on the Interpretation of Statutes, 153." *United States v. Tynen*, 11 Wall., 88; *Stockwell v. United States*, 13 Wall., 531.

Letting house for purpose of prostitution — Reputation of house — Knowledge of lessor, how shown.—The supreme court of Indiana, discussing these propositions in the case of *Grafter v. The State*, 105 Ind., 271, say:

"The sixth, seventh and eighth instructions given by the court are complained of.

"In the sixth the jury were told that it was not necessary for the state to prove particular acts of prostitution as having occurred in the house in order to establish the allegation that it was a house of ill fame; that, while such proof was competent, it was also competent for the purpose of sustaining such allegation, to prove the general reputation of the house, and also of its inmates and frequenters, male and female, 'and of the defendant for chastity and virtue.' The last part of the instruction is especially assailed. If any evidence had been either offered or admitted upon the subject of the defendant's chastity or virtue, in proof of the allegation referred to, we should have no doubt but that the giving of that part of the instruction quoted, as well as the admission of such evidence, would have been such error as must have resulted in a reversal. It was not proper to admit or to consider evidence of the defendant's reputation for chastity and virtue in order to establish the allegation that the house was a house of ill fame. No such evidence was offered or admitted, and, so far as the record shows, the subject of the defendant's reputation was in no manner suggested during the course of the trial except as above stated. We cannot, therefore, considering the result arrived at upon the evidence, regard the error as one which could have misled the jury, or prejudiced the substantial rights of the defendant. Sec. 1891, R. S. 1881; *Epps v. State*, 102 Ind., 539. That it was competent to consider evidence of general reputation to establish the fact that the house was kept as a house of ill fame, see *Bells v. State*, *supra*.

"The jury were told, in the seventh instruction, that a landlord could not be convicted of the offense charged, without proof that he had knowledge that the house let was kept as a bawdy-house, but that it was not necessary to prove that he had witnessed acts of prostitution in the house, or that he had been personally notified of such acts; that knowledge might be proved by circumstantial evidence, — by proof of such facts and circumstances as would justify the jury in coming to the conclusion that he had such knowledge. The appellant insists that the proof must have shown that he had actual knowledge that the house was being kept as a house of ill fame, and that, with such knowledge, he willingly permitted the house to be so kept. If by actual knowledge it is meant that he must have had personal knowledge, from having witnessed acts of prostitution, we do not

agree with counsel's contention. The appellant may have had such actual knowledge, from facts and circumstances, as required him to expel the occupants of the house. The owner of a house so kept may not shut his eyes to that which is patent to the community around him, and stop his ears from that which has become notorious among his neighbors, and say he has no actual knowledge. To hold that personal knowledge, from having witnessed acts of prostitution, or notice from persons who had witnessed such acts, was required, would be to render the statute practically a dead letter. The jury had been told in the third instruction that, before the defendant could be convicted, they must be satisfied beyond a reasonable doubt that he had knowingly permitted the house to be kept by Mollie Avery as a house of ill-fame, resorted to for the purpose of prostitution.

"Considered in connection with the third, the seventh instruction was not erroneous. The court told the jury that 'the statute upon which this prosecution is based was enacted for the first time in this state in 1881. Prior statutes had proven insufficient to restrain what all good citizens regarded as an alarming evil. This statute aims to lessen the evil by interposing a formidable obstacle to the securing of houses and shelter by prostitutes.' We are unable to discover anything in this which could have prejudiced the appellant.

"The contention of the appellee that the instructions are not in the record is not well made. They are properly presented by a bill of exceptions filed under section 1849, Revised Statutes of 1881. This latter section appears, through an error, to be cited in *Erlinger v. East*, 100 Ind., 434. The section there intended was 629, Revised Statutes of 1881.

"It is contended with much earnestness that the evidence does not sustain the verdict of the jury. The argument, at this point, is directed to two propositions: *First*, that there is no evidence that the defendant knew that the house was being kept as a house of ill-fame; *second*, that the proof does not show that the house was rented to Mollie Avery, and that it was being so kept by her as the tenant of the appellant, and that, therefore, there is a fatal variance. Five witnesses testified, on behalf of the state, to the effect that the house had been kept as a house of prostitution by Mollie Avery for a period of from two to three years before the indictment was returned; that at some periods three and four prostitutes at a time were inmates of the house; that it was generally reputed to be a house of prostitution; that the defendant, during all that time, lived about one square and a half distant, and in sight of the entrance to the house; that men and lewd women were frequently seen to go in the house, both in the day and night time. One witness testified that on several occasions inmates of the house had been arrested; that from two to five men at a time were seen in the house. The defendant did not offer a syllable of testimony of any kind, and in this state of the evidence the jury, under instructions from the court, found him guilty of knowingly permitting the house to be kept as a house of ill fame. That the ill fame of the house existed, and that it was flagrant and notorious, is not and cannot be disputed. In such a case, want of knowledge is a fact so peculiarly within the breast of the accused that it must be regarded as an essential element of his defense. *Brow v. State*,

103 Ind., —; *Goetz v. State*, 41 Ind., 102; *Farrell v. State*, 45 Ind., 371; *Ward v. State*, 48 Ind., 289; *Goodwin v. Smith*, 72 Ind., 113.

"When the state proved the fact to exist, and that it was a matter of general repute in the community in which the defendant lived, a *prima facie* case was made. It was then incumbent on the defendant to show that he had no knowledge, or that the circumstances were such that he may have remained ignorant of the facts."

THE STATE V. BOWMAN.

(103 Ind., 69.)

INDICTMENT: *Motion to quash* — *Signature of foreman*.

1. INDICTMENT — MOTION TO QUASH.— A motion to quash will be sustained where the indictment is not indorsed by the foreman of the grand jury.
2. SIGNATURE OF FOREMAN.— Where the indictment is signed by one whom the record shows to have been the foreman, the mere omission to add the word "foreman" will not invalidate the indictment.

From the Monroe Circuit Court.

F. T. Hord, attorney-general, and *J. E. Henley*, for the state.

J. W. Buskirk and *H. C. Duncan*, for appellee.

ELLIOTT, J. The trial court quashed the indictment for the alleged reason that the indorsement, "a true bill," was not properly subscribed by the foreman of the grand jury. The indictment is indorsed as follows:

"Charge:

"Selling without license.

"WILLIAM PETERSON.

"A true bill.

"———, Foreman."

It appears from the record that William Peterson was the foreman of the grand jury, and the fault in the indorsement is that he signs above the words "a true bill," and not on a line with the word "foreman." It has long been the rule that a motion to quash will be sustained unless the indictment is indorsed by the foreman of the grand jury. *Johnson v. State*, 23 Ind., 32; *Heacock v. State*, 42 Ind., 393; *Cooper v. State*, 79

Ind., 206. In the last case it is strongly intimated that if the record affirmatively showed that the indictment was indorsed by the foreman, the motion would not prevail. We think the record before us does show this. It appears that William Peterson was the foreman of the grand jury; that the indictment was brought into open court; and the name of William Peterson is written on the back of the indictment. As there was but one William Peterson on the jury, and as his name appears on the back of the indictment, the sensible and only natural presumption is that the signature on the back of the indictment is that of the foreman of that name appointed by the court. The placing of the name above instead of below the words "a true bill," ought not to destroy the validity of the indorsement, nor should the failure to add the descriptive word "foreman" be permitted to have the effect to render the indictment bad. The name of the foreman is indorsed on the indictment, and the only mistake is in the position in which the name is placed. Bishop gives the proper form for the indorsement of the indictment, and adds: "But it is sufficient in law merely to write his name, with no mention of his official character, because the latter appears of record. For the like reason, where his whole name is in the record, a signature by initials for his Christian name is adequate." This author also says: "It is immaterial on what part of the bill the foreman's signature appears." 1 Bish. Crim. Proc. (3d ed.), § 698.

It is evident that the error in the form of the indorsement could not have prejudiced the substantial rights of the appellant, and in such cases the statute makes it our duty to disregard all merely technical errors. This is a general rule, and is in harmony with the provision of the statute that an indictment is sufficient when "it can be understood therefrom that the indictment was found by the grand jury of the county" (R. S. 1881, § 1755), and with the further provision that an indictment shall not be quashed "for any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits." R. S. 1881, § 1756; *Stout v. State*, 96 Ind., 407; *Galvin v. State*, 93 Ind., 550; *Wood v. State*, 92 Ind., 269, see page 272.

Judgment reversed, with instructions to overrule the motion to quash.

THE STATE V. SNEED.

(10 Lea (Tenn.), 450.)

INDICTMENT: *Nuisance.*

INDICTMENT — VENUE.— An indictment alleging, generally, an offense to have been committed in the county where it is found, if otherwise valid, is sufficient without any more particular designation of the precise locality.

Appeal in Error from the Common-law Court of Madison county.

Attorney-General Lea, for the state.

H. C. Anderson, for Sneed.

DEADERICK, C. J. At June term, 1885, of the common law and chancery court of Madison county, the defendant was indicted for committing a nuisance. The indictment was quashed, and the state has appealed. The indictment charges that defendant, "on June 15, 1884, and divers days and times from then until the finding of the indictment, in the county of Madison, did unlawfully, in the near neighborhood of divers public streets, where divers persons are constantly passing and repassing, and of divers dwelling-houses, inhabited and occupied by divers other citizens, keep and maintain and carry on a certain slaughter-house, for the slaughter of cattle, in such a manner that foul, noisome and offensive odors, smells and stench were emitted," etc., "and permitted then and there offal, entrails, etc., of said cattle, and other filthy and offensive substances, to remain, etc., to the common nuisance and annoyance," etc. The indictment was quashed for want of a sufficiently specific designation of the place of the alleged nuisance.

The place is charged to be in Madison county, in the near neighborhood of divers public streets. In *Cornell v. State*, 7 Baxt., 520, the indictment charged Cornell with causing and suffering offal, filth, etc., to be collected and remain "on Commerce street, in the city of Memphis," etc. It appeared in evidence that the nuisance complained of was upon the back part of lot No. 83, Commerce street. It was held by this court that the description of the *locus in quo* was not sufficiently

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definite; that the indictment charged the place as a street, whereas the evidence showed it to be upon a lot. The charge in the indictment was specific, and it was perhaps proper, in that case, to hold that the averments should be supported by proof. But in criminal cases ordinarily it is sufficient to allege that the offense was committed in the county where the indictment is found, with such averments as are necessary to constitute the offense charged. Thus, profanity must, to be indictable, be in a public place, and so charged, but the particular locality need not be charged; and so of most other offenses. It does not appear why, in this case, it is necessary that the particular locality of the nuisance should be averred. We think the offense and venue are sufficiently set out in the indictment, and that the judgment of the court below in quashing the indictment was erroneous; and the same will be reversed, and the cause remanded for further proceedings.

STATE v. BROOKS.

(33 Kan., 708.)

INTOXICATING LIQUORS: *Jurisdiction — Information — Arrest — Trial — Time of offense — Kind of liquor — Evidence — Costs.*

1. VIOLATION OF PROHIBITORY LAW — JURISDICTION OF DISTRICT COURT.— The district court has original and concurrent jurisdiction with justices of the peace to hear and determine criminal prosecutions for violations of the prohibitory liquor law of 1881, of the state of Kansas, where the punishment to be imposed cannot exceed a fine of \$500, or imprisonment in the county jail one year.
2. INFORMATION.— Prosecution in the district court may be upon information filed by the county attorney.
3. ARREST — TRIAL.— And where such information states an offense, and is sworn to positively by some person, it is sufficient of itself to authorize the clerk to issue a warrant for the arrest of the defendant, without any finding by the clerk or other person of probable cause to believe the defendant guilty of the offense, and is sufficient to authorize the district court to put the defendant upon his trial.
4. VERIFICATION OF INFORMATION.— An information sworn to positively by some person need not be verified by the oath of the county attorney.¹

¹See note.

5. **STATING TIME WHEN OFFENSE WAS COMMITTED.**—Where a county attorney files an information on October 15, 1884, and states that the offense was committed on the — day of —, 1884, and does not state the day or the month when the offense was committed, *held*, that the information is, nevertheless, sufficient.
6. **KIND OF LIQUOR SOLD.**—Kind of intoxicating liquor, or person to whom sold, need not be stated.
7. **CONVICTION — EVIDENCE.**—Where the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense, except some offense which the complaining witness had in contemplation at the time of verifying the information.
8. **COSTS.**—Where a defendant is prosecuted in separate counts for several violations of the prohibitory liquor law, and is found guilty under some of the counts and not guilty under the others, he should not be required to pay costs accruing under the counts upon which he is acquitted, but should recover costs.

Appeal from Allen District Court.

G. P. Smith, for appellant.

S. B. Bradford, attorney-general, for the state; *Edwin A. Austin*, of counsel.

VALENTINE, J. This was a criminal prosecution under the prohibitory liquor law of 1881. The information was filed in the district court of Allen county on October 15, 1884, by the county attorney, charging the defendant, Hiram Brooks, in four separate counts, with four separate violations of said law. Each offense was charged as having been committed on the — day of —, A. D. 1884; and while it is charged that the defendant sold intoxicating liquors in violation of law, yet the kind of intoxicating liquors sold is not stated, nor is the name of the person to whom the liquors were sold given. The information was sworn to positively by J. C. Gilbert, a private citizen, and the county attorney did not verify the same by his own oath. The defendant made several motions, among which were motions to quash the information and to have himself discharged from arrest; which motions were overruled by the court, and the defendant excepted. The defendant was duly arraigned, but refused to plead, and the plea of "not guilty" was entered for him. A trial was had before the court and a jury. Evidence was introduced tending to show that the defendant had sold intoxicating liquors to various persons at

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various times in violation of law. The state then elected to rely for a conviction under the first count of the information upon a sale of whisky made by the defendant to Oscar Dwindle,—a sale with reference to which the prosecuting witness, J. C. Gilbert, had no knowledge or notice; and the prosecution also made elections with reference to the other counts. The court instructed the jury, and the defendant duly excepted to the instructions as given. The jury found the defendant guilty under the first count of the information, and not guilty under the other counts. The defendant moved for a new trial upon various grounds, which motion was overruled by the court, and the defendant excepted. The court then sentenced the defendant to be confined in the county jail for thirty days, and to "pay the costs of this proceeding," and that he stand committed to the county jail until the costs were paid; to which sentence and judgment the defendant excepted, and now appeals to this court.

We think the information is sufficient. It states a cause of action in each count against the defendant, and although it is claimed to be an information, and it is in fact an information, yet in essence and in substance it is also a complaint, within the requirements of the prohibitory liquor law. The offenses charged therein are misdemeanors, in which the punishment for each offense cannot exceed a fine of \$500 or imprisonment ninety days; and it has several times been held by this court that the district court has original and concurrent jurisdiction with justices of the peace to hear and determine cases of misdemeanor in which the punishment for each offense cannot exceed a fine of \$500 and imprisonment one year. *State v. Watson*, 30 Kan., 281; Comp. Laws, 1879, ch. 83, sec. 1. In justices' courts the original pleading may be properly called a complaint, but in the district court it may properly be called an information or indictment; for, in the district court, criminal prosecutions can be conducted or carried on only upon information filed by the public prosecutor, or upon indictments found by the grand jury. Crim. Code in general, and articles 6 and 7 especially. See, also, sections 21 and 22 of the prohibitory act. The information sets forth facts sufficient to constitute four separate offenses, and all the facts constituting the offenses are set forth in detail and in full, except as heretofore

stated; and the information is duly verified by the positive oath of J. C. Gilbert, and is sufficiently verified within the decision made by this court in the case of *The State v. Gleason*, 32 Kan., 245.

Under such circumstances we do not think that it was necessary for the county attorney to also verify the information, nor do we think that the failure of the county attorney to state the day and the month when the offenses were committed renders the information insufficient; for it is never necessary, in criminal prosecutions, to prove the allegations merely setting forth the day or the month when the offenses are alleged to have been committed. All that is necessary to be proved in any case like this is that the particular offense charged was committed within such a time that the prosecution therefor is not barred by the statute of limitations; or, in other words, all that is necessary to be proved is that the offense was committed within two years next preceding the time of the filing of the information. The information in the present case stated that the offenses were committed in the year 1884, and, as before stated, this information was filed on October 15, 1884. We think the information was sufficient in this particular. Authorities may be found, however, holding that it is necessary in charging criminal offenses to state a particular day and the particular month when the offense was committed; but as all the authorities agree that such allegations need not be proved, and that they answer no material purpose, it would seem that such allegations are wholly unnecessary and immaterial. Neither is it necessary in this state to state the kind of liquor sold, or the name of the person to whom sold, for the statute expressly and specifically provides that these things need not be stated. Prohib. Liquor Law, § 21. Of course, the information in this case might have been made better than it was, and we think it ought to have been made better; but still we think it was and is sufficient. Taking the facts therein stated, and the positive oath of Gilbert, it showed probable cause to believe that the defendant was guilty of the offenses charged against him, and authorized the issue of a warrant for his arrest; and it was not necessary for the clerk or any other person to make a finding that there was such probable cause. The information alone, verified as it was by the positive oath of Gilbert, was

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sufficient to show probable cause, and to authorize the clerk to issue the warrant. Crim. Code, § 126. And when the defendant was arrested and arraigned for trial, we think the information was sufficient to authorize the court to put him upon his trial.

We now come to a more serious question. Can the defendant be convicted of an offense, of which the complaining witness, at the time when he verified the information, had no knowledge or notice, and concerning which he had never had a thought? Upon sound legal principles, and in all common fairness, it would seem that he should not. If he should be convicted under such circumstances, he would be convicted of an offense not intended to be charged against him, and really not charged. It is true that he would be convicted of an offense of a similar character to the one charged against him, but he would not be convicted of the exact and identical offense charged. When the complaining witness verifies an information, he must do so positively, and in such a manner as to indicate that he had actual knowledge of the facts to which he makes oath; and this he does, among other things, for the purpose that a warrant may be issued against the defendant for his arrest (*The State v. Gleason*, 32 Kan., 245); and it must be presumed, in the absence of anything to the contrary, that he has such actual knowledge. It cannot be supposed that he makes oath to an offense of which he has no knowledge or thought. Indeed, it has often been held by courts, that where a person makes oath to a thing concerning which he has no knowledge, and where he does not know whether his statements concerning the thing are true or not, he commits perjury, although his statements may, in fact, be true. 2 Bish. Crim. Law, § 1048; 2 Whart. Crim. Law, § 1247. Besides, as the defendant, in this class of cases and in this state, may be convicted of selling any kind of liquor out of the entire catalogue of intoxicating liquors, although not one of such liquors is specifically mentioned in the information, and may be convicted of selling the same to any living person, although no person's name is given, and may be convicted of selling the same at any time within two years next preceding the filing of the information, whether any particular time is mentioned in the information or not, the defendant

ought to have some other means of identifying the offense of which he is charged, and some means for preparing for his defense; and if he cannot feel assured that he is to be tried only for some offense of which the complaining witness has knowledge, and for some offense intended at the time of the filing of the information to be charged against him, then surely he has no such means, nor any reasonable means, of preparing for his defense. In all fairness to him, it would seem that the state should not be allowed to prove any offense except some offense which the complaining witness had in contemplation when he swore to the information.

Any other rule would permit a defendant to be charged in a very vague and indefinite manner with the commission of a single offense, to be tried for a hundred or more, to be required to prepare his defense for all, and be then convicted of an offense of which, at the commencement of the trial, he had no thought, and for which he had made no preparation for defense, and be convicted of an offense to which he either would have made a successful defense or would have pleaded guilty, and have saved all the costs and expenses of the prosecution, if he had only had some sufficient or proper notice. We know of no decided case squarely in point on either side of this question; but there are cases upon analogous questions which have some application. Some of such cases are those which hold that where a grand jury finds an indictment against a defendant and alleges the offense with reference to some person unknown to the grand jury, the defendant can be convicted only of an offense concerning some person who was in fact unknown to the grand jury, and whose name had not been disclosed to them. 1 Bish. Crim. Proc., §§ 546-553; Whart. Crim. Ev., § 97; 2 Whart. Crim. Law, § 1511.

The constitution of the state of Kansas provides, among other things, that "in all prosecutions the accused shall be allowed to appear and defend, in person or by counsel; to demand the nature and cause of the accusation against him; to meet the witness face to face; and to have compulsory process to compel the attendance of witnesses in his behalf." Const., Bill of Rights, § 10. "And no warrant shall issue but on probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the person or property

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to be seized." Const., Bill of Rights, § 15. Now, if a defendant may be prosecuted for selling intoxicating liquors contrary to law, without setting forth any statement of the kind of intoxicating liquor sold, or when he sold the same, or to whom he sold the same, and for an offense of which the complaining witness had no knowledge or thought when he verified the information by his oath, it would seem that these provisions of the constitution would be of but little benefit. And in cases like the present, where the entire prosecution is based and founded upon the oath of the complaining witness, his knowledge of the offense is more important than the knowledge of prosecuting witnesses usually is. The principles running through the foregoing cases, and through all the decided cases that have any application to this case, and the principles embodied in the constitutional bill of rights, are that an accused person must be given a fair notice of the exact offense charged against him; that, when tried, he must be tried for that offense only, and not for some other offense not charged; and that the charge, with its accompanying circumstances, must not be so uncertain and misleading as to beguile him into the belief that he is to be tried for one offense, when, in fact, he may be tried for another.

In the present case, when the complaining witness verified the information, he had in contemplation at least four different offenses, of all of which, presumably, he had knowledge; but the defendant was not convicted of any one of such offenses, but was convicted of still another offense, and of an offense concerning which the complaining witness did not have the slightest thought or information. We think the prosecution should have been confined to the offenses which were in the mind of the complaining witness when he verified the information. If he had only four offenses in contemplation at that time, the state should have been confined to those four,—one under each count of the information. If, however, he had in contemplation a larger number, then the state should have been required to elect at the proper time as to which of the offenses and under which counts it would rely for a conviction. If the complaining witness had in contemplation fifty or one hundred or more violations of law, as possibly he had, the prosecution should at the proper time have selected some four of them, and

relied upon these four for a conviction, and not have selected some supposed offense of which the complaining witness had no knowledge or thought.

We think the court below erred in permitting the defendant to be convicted of an offense which was not contemplated at the time of the filing of the information. This error pervaded the entire case,—the introduction of the evidence, the instructions to the jury, the verdict and sentence, and the order of the court overruling the defendant's motion for a new trial. Both Gilbert and Dwindle were witnesses in this case; and it was shown beyond all controversy that Gilbert, the complaining witness, had no knowledge or thought, at the time of or prior to his verifying the information, of the offense of which the defendant was found guilty. We also think that the court below erred in rendering judgment for costs. On three of the counts of the information the defendant was acquitted; and upon these three counts he should not have been required to pay costs, but should have recovered costs.

The judgment of the court below will be reversed, and cause remanded for a new trial.

(All the justices concurring.)

NOTE.—In *The State v. Carlyle*, 33 Kan., 716, Valentine, J., delivering the opinion of the court, says: "Many of the facts of this case are similar to those of the case of *State v. Brooks*, 33 Kan., 708, and the same decision must follow. But in this case there is one question that was not involved in the *Brooks Case*. In this case, as in that, the defendant was charged upon information in four separate counts with four separate violations of the prohibitory liquor law of 1881; but in this case he was convicted and sentenced under each count, and under each of the first three counts he was sentenced to imprisonment in the county jail for the term of ninety days, as follows: Under the first count the imprisonment was to commence at the date of the sentence; under the second count the imprisonment was to commence at the expiration of the imprisonment under the first count; and under the third count the imprisonment was to commence at the expiration of the imprisonment under the second count,—making in all two hundred and seventy days' imprisonment; and under the fourth count he was sentenced to pay a fine of \$500, and he was also sentenced to pay the costs of the prosecution.

"The defendant claims that such a cumulative sentence cannot be imposed upon him; that as each of these offenses is charged as a first offense, and as the limit of punishment for a single first offense is imprisonment in the county jail for a term not to exceed ninety days or a fine not to exceed \$500, he could not be imprisoned under the information for more than

ninety days, and could not be required to pay a fine under the information of more than \$500, and only one of such punishments could be imposed upon him under a single information, however many counts might be contained in the information, and of however many offenses under such information he might be found guilty. We think, however, that the sentence of the court below in this respect is correct. The court had the right, and it was its duty, to sentence the defendant separately under each count; and it had the right to impose the maximum punishment under each count, and under each count could sentence the defendant to pay a fine of \$500 or to be imprisoned in the county jail for ninety days. Prohib. Liquor Law 1881, § 7. And the court also had the right, in sentencing the defendant under the several counts, to adjudge that the imprisonment under one count should begin at the termination of the imprisonment under another count. Crim. Code, § 250. Technically, we suppose, the costs incurred under each count should be taxed separately under such count; but it is wholly immaterial in this case whether the costs were taxed separately under each count or in the aggregate under all the counts.

"The judgment of the court below will be reversed, and cause remanded for a new trial."

See *In re Jackson* and note, 4 Am. Cr. R., 568.

THE STATE V. SKINNER.

SAME V. GORMALLY.

SAME V. FREW.

SAME V. CARNINE.

SAME V. TEFT.

(34 Kan., 256.)

INTOXICATING LIQUORS: *Plea in abatement—Selection of grand jury under the code—Jurors—Challenge—Indictment—Evidence—Instructions.*

1. **PLEA IN ABATEMENT.**—A plea in abatement is a dilatory plea, and must be pleaded with strict exactness; it must be certain to every intent.
2. **IRREGULARITY IN SELECTION OF GRAND JURY.**—Under the provisions of section 79, Criminal Code of Kansas, no plea in abatement taken to any grand jury duly charged and sworn, for any irregularity in their selection, will be sustained, unless it be one that implies corruption.
3. **CHALLENGE.**—Where an indictment or information in separate counts states separate misdemeanors of a kindred character against the same person, the defendant is not entitled to four peremptory challenges upon each count or separate offense, but is entitled, upon the trial under the indictment or information, to four peremptory challenges, and no more.
4. **COMPELLING STATE TO ELECT UPON WHAT COUNT TO RELY FOR CONVICTION.**—Where an indictment or information charges in separate

counts separate public offenses, and they are all misdemeanors of a kindred character and against the same person, the defendant cannot, as a matter of right, require the state, before the trial, to elect upon what count or specific offense it will rely for conviction.

5. **DIFFERENT OFFENSES THAN CHARGED IN INDICTMENT.**—Where distinct transactions in cases of misdemeanors are joined in separate counts in one indictment against the same person, and followed by one trial for all, the defendant cannot prove by the county attorney, or any witness before the grand jury, that the offenses for which he is being tried were not the identical offenses which the grand jury had in contemplation when finding the indictment, as the grand jury are at liberty to find a bill upon their own knowledge.
6. **SALE OF LIQUOR—EVIDENCE.**—In a case where the defendant is charged with unlawfully selling intoxicating liquors without a permit, in violation of the prohibitory liquor law of the state, and evidence is introduced making the question important, it is not error for the court to permit the witness to answer as to "who assumed to be the proprietor of and to control the premises described in the indictment." Even if the evidence offered be regarded rather as an opinion than a fact, it is of such a character of opinion as may be stated by a person who witnessed the conduct and conversation of the defendant at the time upon the premises.
7. **SALE BY CLERK.**—Where a person acts as clerk or agent of another in selling intoxicating liquors for him, with his knowledge and consent, in violation of law, the principal may be prosecuted and punished for such unlawful sales by his clerk or agent; and in such a case, where it is admitted that the principal has no permit to sell intoxicating liquors, it is not necessary for the state in the first instance, in order to convict the principal, to show that his clerk or agent had no permit, if the sales were made by the clerk or agent for the principal in the ordinary line of his duty.
8. **INSTRUCTION.**—The following instruction held not to violate section 215 of the Criminal Code, which provides that the neglect or refusal of the person on trial to testify shall not be considered by the court or jury before whom the trial takes place, viz.: "You are not authorized by law to arbitrarily reject, without cause or reason, the testimony of any witness, but it is your duty to carefully examine, and, so far as possible, harmonize, all the testimony in the case upon the basis of truth; but if you are unable to do all this, then you are authorized, and it is your duty, to reject such of it as you may think not entitled to credit; and in considering the testimony you should not draw any unfair inferences or unjust conclusions against the defendant because of any failure or omission on his part to offer any particular kind of evidence, but he should be tried alone upon the facts proved. You are to presume the existence of no fact unless it has been testified to; you are to found your verdict on the testimony delivered by the witnesses upon the witness stand, and are not to supplement it with some other fact that you may think exists, but which has not been proved."
9. **CHALLENGING JURORS—SUMMONING OTHER JURORS.**—Where a challenge to the array or panel of petit jurors is sustained, there need be

no delay on the part of the court in summoning, under the provisions of the statute, a sufficient number of persons, properly qualified, to act as jurors in any case.

Appeals from Osage District Court.

On April 21, 1884, an indictment was filed in the district court of Osage county against Charles Skinner, charging him in seven different counts with unlawfully selling intoxicating liquors in violation of chapter 128, Laws 1881, commonly known as the "Prohibitory Liquor Law." Afterwards Skinner was arrested, and at the proper time filed a plea in abatement which charged that the trustees of Osage county for the year 1884 did not select for jury service the names of persons on the assessment rolls of 1883, but wilfully neglected, failed and refused so to do; that, instead, they substantially and palpably disregarded the law, and made their selection of names from a class of persons incompetent to serve; that the foreman and eight members of the grand jury who found the indictment against him were of a class incompetent to be drawn or to serve. To this plea the *state* filed in writing its answer. Upon the trial the *state* objected to the introduction of any testimony under the plea in abatement, because it did not state facts sufficient to constitute a defense, or sufficient to abate the cause of action. The court sustained the objection, and refused to hear or consider any evidence of the defendant under said plea. Thereupon, before the trial, the defendant filed in writing his motion to require the state to elect as to what specific offenses it would rely upon, which motion was overruled. The defendant then (May 23, 1885) waived arraignment and pleaded not guilty. The jury returned a verdict of "not guilty" upon the first, sixth and seventh counts of the indictment, and found the defendant guilty upon the second, third, fourth and fifth counts. On May 23, 1885, the defendant filed his motion for a new trial, and on June 4, 1885, filed his motion in arrest of judgment, alleging therein that the grand jury that found the indictment had no legal authority to inquire into the offenses with which the defendant was charged, and that the facts stated in the indictment do not constitute any offense. These motions were overruled, and on said June 4, 1885, the court sentenced the defendant to pay a fine of \$100 on the second count, \$200 on the third count, \$200 on the fourth count,

and on the fifth count to be committed to the jail of Osage county for a period of thirty days; the fines in all aggregating the sum of \$500. It was further adjudged that the defendant pay the costs of the prosecution, taxed at \$—, and that he be committed to the jail of the county until the fines and costs were paid. The defendant excepted to the rulings, orders and judgment of the court, and brings his case here.

On October 14, 1884, an indictment was filed in the district court of Osage county against James Gormially, charging him in eleven counts with unlawfully selling intoxicating liquors in violation of the prohibitory liquor law of 1881. The same plea in abatement to the indictment made in the Skinner case was made in this case, with the same result. Before the trial the defendant moved the court to require the state to further inform him for what specific offenses he was to be tried, which was denied. Trial was begun May 20, 1885, before the court, with a jury. The defendant demanded four peremptory challenges for each offense or count stated in the indictment, but was limited to and made use of four only, the others being denied. The jury returned a verdict of not guilty as charged in the fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh counts of the indictment, but found him guilty as charged in the first, second and third counts. A motion for a new trial was filed by the defendant on May 21, 1885, and a motion in arrest of judgment was filed by him on June 4, 1885. These motions were overruled, and the defendant was sentenced to pay a fine in the sum of \$100 on the first count of the indictment, \$200 on the second count, and upon the third count he was ordered to be committed to the jail of Osage county for a period of thirty days; the fines aggregating \$300. The defendant was also adjudged to be committed to the jail of the county until the costs and fines were paid. The defendant excepted to the rulings, orders and judgment of the court, and brings his case here.

On October 21, 1884, an indictment was filed in the district court of Osage county against J. N. Frew, charging him in eleven counts with unlawfully selling intoxicating liquors in violation of the prohibitory liquor law of 1881. The same plea in abatement to the other indictments was made in this case. He also filed a motion to require the state to elect,

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which was refused. Trial had May 28, 1885, before the court with a jury. The jury returned a verdict of not guilty as to the sixth, seventh, eighth, ninth, tenth and eleventh counts of the indictment, but found him guilty as charged in the first, second, third, fourth and fifth counts. Motions for a new trial and in arrest of judgment were filed and overruled; and on June 5, 1885, the defendant was sentenced to pay a fine of \$100 on the first count of the indictment, \$100 on the second count, \$100 on the third count, \$200 on the fourth count, and to be committed to the jail of Osage county for a period of thirty days upon the fifth count; the fines aggregating in all \$500. The defendant was also adjudged to be committed to the county jail of the county until the fines and costs were paid. The defendant excepted to the rulings, orders and judgment of the court, and brings the case here.

On October 23, 1884, an indictment was filed in the district court of Osage county against James Carnine, charging him in four counts with unlawfully selling intoxicating liquors in violation of the prohibitory liquor law of 1881. He also filed a plea in abatement, which was disposed of as the others were. He also demanded four peremptory challenges upon each count or offense stated in the indictment, but was limited to and made use of four only. Trial was begun June 4, 1885, before the court with a jury. The jury returned a verdict of not guilty upon the first count of the indictment, but guilty as charged on the second, third and fourth counts of the indictment. Motions for a new trial and in arrest of judgment were filed, which were overruled; and on June 5, 1885, the court sentenced the defendant to pay a fine of \$100 on the second count of the indictment, \$200 on the third count, and that he be committed to the jail of Osage county for a period of thirty days on the fourth count; the fines aggregating \$300. It was further adjudged that the defendant stand committed to the jail of the county until the fines and costs were fully paid. The defendant excepted to the rulings, orders and judgment of the court, and brings the case here.

On October 24, 1884, an indictment was filed in the district court of Osage county against Gus. Teft, charging him, in thirteen counts, with unlawfully selling intoxicating liquors in violation of the prohibitory liquor law of 1881. The same plea

in abatement to the indictment made in the foregoing cases was made in this case, with the same result. Trial was begun February 24, 1885, before the court with a jury. The defendant entered a verbal challenge to the array and entire panel of jurors, which was overruled. The jury returned a verdict of "guilty as charged in each and every count of the indictment, excepting the second count thereof." Subsequently motions for a new trial and in arrest of judgment were filed. The motion for a new trial was overruled as to the first, third, fourth, fifth, sixth, seventh, eighth and thirteenth counts of the indictment, but sustained as to the second, ninth, tenth, eleventh and twelfth counts thereof. The motion in arrest of judgment was wholly overruled. The indictment, and the second, ninth, tenth, eleventh and twelfth counts thereof, were continued, and the defendant required to give bail in the sum of \$500. The court sentenced the defendant to pay a fine of \$100 on the first count, \$125 on the third count, \$150 on the fourth count, \$175 on the fifth count, \$200 on the sixth count, \$225 on the seventh count, and that the defendant be committed to the jail of Osage county for a term of thirty days upon the eighth count, and that he be committed to the jail of said county forty-five days on the thirteenth count; the fines aggregating \$975, and the imprisonment seventy-five days. The defendant was further adjudged to be committed to the county jail of the county until the fines and costs were paid. The defendant excepted to the rulings, orders and judgment of the court, and brings the case here.

S. B. Bradford, attorney-general, for the state; *Elwin A. Austin*, of counsel.

Ellis Lewis and Waters & Chase, for appellants.

HORRON, C. J. In all these cases the defendants were convicted of unlawfully selling intoxicating liquors without a permit, in violation of the prohibitory liquor law of 1881. They are so nearly similar and have so many points in common that they may be considered together.

1. We think the trial court very properly refused to receive any evidence in support of the pleas in abatement, charging that the members of the grand jury returning the indictments

in these cases were not drawn and summoned in accordance with the provisions of the statute. A plea in abatement is a dilatory plea, and must be pleaded with strict exactness,—it must be certain to every intent; consequently, we must construe the pleas as alleging that the grand jurors were incompetent, simply because the trustees of Osage county for the year 1884 did not select for jury service the names of persons on the assessment rolls of 1883. It is nowhere alleged in the pleas that the grand jurors were minors, aliens, or insane persons; therefore, while the grand jurors were not drawn or summoned from the class or list prescribed by the statute,—and in that regard the essential provisions of the statute were disregarded,—the pleas go merely to the selection and drawing of the jurors, and not to the personal disqualifications of the jurors, as that phrase is understood. In the excellent work of Thompson & Merriam on Juries it is said that the reports show no authentic instance of a challenge allowed to grand jurors, either individually or to the array, at common law. Section 507. If we look to the statute we find that section 79 of the Criminal Code provides:

“No plea in abatement, or other objection, shall be taken to any grand jury duly charged and sworn, for any alleged irregularity in their selection, unless such irregularity, in the opinion of the court, amounts to corruption, in which case such plea or objection shall be received.”

Under the terms of the statute, no objection going merely to the manner of the selection or drawing of a grand jury will be recognized, unless it be one that implies corruption. *State v. Marsh*, 13 Kan., 596; *Hardin v. State*, 22 Ind., 347.

2. Each indictment contains several counts, each count charging a separate offense. Upon the trial each defendant claimed the right to four peremptory challenges for each count or separate offense contained in the indictment found against him, but was limited to four only. Peremptory challenges were not allowed at common law in trials for misdemeanors. Whart. Crim. Pl. & Pr. (8th ed.), § 618. The statute regulating peremptory challenges in criminal cases reads:

“The defendant, in every indictment or information, shall be entitled to a peremptory challenge of jurors in the following cases, as follows: . . . (4) In cases not punishable with

death or imprisonment in the penitentiary, to the number of four, and no more." Crim. Code, § 198.

With the knowledge that separate public offenses, where they are all misdemeanors of a kindred character and charged against the same person, might be joined in separate counts in the same indictment or information, the legislature has declared that the defendant in every indictment or information is entitled, in cases like those under review, to four peremptory challenges of jurors, *and no more*. The statute seems to us clear and conclusive, and to limit the defendants to the challenges stated therein, whether the indictment or information contains one or more counts. In civil cases it is said that peremptory challenges are allowed to protect parties, not so much from the bias or prejudice which might arise in the mind of a juror from personal dislike or hatred of those who might happen to be plaintiffs or defendants in the action, but rather that which might relate to or grow out of the subject-matter in controversy. *Stone v. Segur*, 93 Mass., 568. In a criminal case it is understood that the peremptory challenge is allowed to the accused upon his own dislike to the individual juror challenged; that is, to protect him from the bias or prejudice in the mind of the juror from personal dislike or hatred of the party being tried. If there is anything in these theories for allowing peremptory challenges, it would be perfectly consistent for the legislature to limit the defendant in every indictment or information to the challenges named in the statute, although separate public offenses were charged therein against him. Whatever may be the reasons, however, for the allowance of peremptory challenges in civil and criminal cases, the statute must control; and the court having followed the terms of the statute, we perceive no error in its refusal to permit other peremptory challenges.

3. The court below committed no error in overruling the several motions of defendants, made before the trials, requiring the state to elect as to what specific offenses it would rely upon. This court has repeatedly decided that separate public offenses, where they are all misdemeanors of a kindred character and charged against the same person, may be joined in separate counts in one information, to be followed by one trial for all. *In re Donnelly*, 30 Kan., 434; *In re Mucke*, 31 id., 54; *State v.*

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Chandler, 31 id., 201; *State v. Crimmins*, 31 id., 376. After the state had introduced its proof upon the trials, elections were made as to which particular transactions the state would rely upon for convictions. This is all the law requires, and was sufficient. *State v. Schweiter*, 27 Kan., 500; *State v. Crimmins*, *supra*.

4. The defendants in the several actions offered to prove by the county attorney and other witnesses before the grand jury that the offenses for which they were being tried were not the offenses for which they had been actually indicted, thus attempting to bring themselves within the law as recently declared in *State v. Brooks*, 33 Kan., 708. The evidence was rejected; and of this complaint is also made, but without any good reason. The county attorney and the other witnesses, not being members of the grand jury, could not by any possibility have had knowledge of the particular offenses which the grand jury had in mind and intended to be covered by the indictments, separate and apart from the allegations therein. Whenever required by an grand jury, it is the duty of the county attorney to attend them for the purpose of examining witnesses in their presence, or giving them advice upon any legal matter. And such attorney may be allowed to appear before the grand jury, on his request, for the purpose of giving an opinion relative to any matter cognizable by them, and may be permitted to interrogate witnesses before them when they or he shall deem it necessary; but no such attorney, or any other officer or person except the grand jurors, is permitted to be present during the expression of their opinions, or the giving of their votes on any matter before them. Crim. Code, §§ 82, 83. Anciently the grand jury did not examine any witnesses; presentments being made alone upon the knowledge of the members of the body. Later the grand jury swore to make presentments, not only of matters and things given in charge, but also of other matters and things which should *come* to their knowledge. It is still in the power of grand jurors to find indictments on their personal knowledge, with no superadded testimony. *Regina v. Russell*, 1 Car. & M., 247; Thomp. & M. on Juries, §§ 464, 467, 614; 1 Bish. Crim. Proc., § 864; Crim. Code, §§ 75, 76. See, also, §§ 91, 92, 93, of the Criminal Code.

5. In some of the cases it is urged that the court erred in

permitting the question to be asked and answered as to who assumed to be the proprietors of and controlled the premises where the intoxicating liquors were obtained. The evidence was admissible. It was not merely an opinion, but a fact derived from the observations of the witness as to the conduct and conversation of the defendants, which it was competent for him to state. But if the evidence be regarded rather as an opinion than a fact, accurately speaking, it was such character of opinion as may be stated by a person who witnessed the conduct and conversation of the parties at the time upon the premises.

6. The court instructed the jury if they found that the person or persons making the sales of intoxicating liquors made the same as clerk, agent or employee of any defendant, and in the ordinary line of his duty as such clerk, etc., then they should find such defendant liable on account of the sales so made, the same as if made by him in person. The court further instructed the jury that in such a case it was not necessary for the state to show that the clerk, agent or employee of the defendant making the sales did not have a permit to sell intoxicating liquors. This instruction was objected to, and it is insisted that the court should have instructed the jury not to convict any of the defendants making sales through a clerk, agent or employee, if the state failed to show that the clerk, agent or employee had no permit. We think otherwise. All the liquors were obtained as beverages; none for medical, scientific or mechanical purposes; none were had upon prescription or affidavit. After the state established that a defendant had no permit to sell intoxicating liquors, but sales thereof were made by his clerk, agent or employee in the ordinary line of his duty, it was not necessary for the state to go further and prove that the clerk, agent or employee had no permit. If any clerk, agent or employee of the defendants, or either of them, was a druggist at the time of the alleged offenses, and had a permit to dispose of intoxicating liquors in accordance with the provisions of the statute, and made sales according to the statute, then such person having a permit and selling liquors thereunder was not acting as the clerk, agent or employee of the defendants, or either of them, in making such sales, and therefore in thus disposing of liquors was

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not acting as the clerk or agent of the defendants or either of them, in the ordinary line of his duty.

7. One of the instructions is criticised upon the ground that it violated section 215 of the Criminal Code, which provides:

"The neglect or refusal of the person on trial to testify shall not raise any presumption of guilt, nor shall that circumstance be referred to by any attorney prosecuting in the case, nor shall the same be considered by the court or jury before whom the trial takes place."

The instruction was as follows:

"You are not authorized by law to arbitrarily reject, without cause or reason, the testimony of any witness, but it is your duty to carefully examine, and so far as possible harmonize, all the testimony in the case upon the basis of truth; but if you are unable to do this, then you are authorized, and it is your duty, to reject such of it as you may think not entitled to credit; and in considering the testimony you should not draw any unfair inferences or unjust conclusions against the defendant because of any failure or omission on his part to offer any particular kind of evidence, but he should be tried alone upon the facts proved. You are to presume the existence of no fact, unless it has been testified to. You are to found your verdict on the testimony delivered by the witnesses upon the witness stand, and are not to supplement it with some other fact that you may think exists, but which has not been proved."

We do not think the criticism justifiable, and considering all the language of the instruction, with the other instructions presented, said section 215 was not infringed.

8. In the Teft case it is alleged that the defendant challenged the entire array and panel of petit jurors on account of the failure of the officers to select and draw the jurors from the class or list prescribed by statute. Comp. Laws 1879, ch. 54, §§ 1 and 2. Thereon evidence was heard, and the challenge overruled. Upon the evidence the challenge ought to have been sustained. The facts bring the case within the authority of *State v. Jenkins*, 32 Kan., 477. Where the challenge to an array of petit jurors is sustained, the statute provides ample authority for the court to summon a sufficient

number of persons to serve as jurors. Section 23, chapter 54, Compiled Laws 1879, reads:

"Whenever, for any cause, petit jurors shall not have been drawn and summoned to attend any court of record, or a sufficient number of qualified jurors shall not be in attendance at such court, the court shall order a sufficient number to be immediately drawn and summoned, as herein provided."

And section 26 of said chapter provides:

"When there shall not be jurors enough present to form a panel in any cause, the court may direct the sheriff or other officer to summon a sufficient number of persons, having the qualifications of jurors, to complete such panel from the bystanders, or from among the neighboring citizens, and the officer shall summon the number so ordered: provided, that in case either party to such cause, by himself or his attorney, shall so request it, it shall be the duty of the judge of such court to select such jurors, and cause a *venire* to issue for the same, naming the jurors so selected therein, as hereinbefore provided."

Therefore, in case the challenge to the array of petit jurors be sustained at any term of court, there ought to be no delay on the part of the court in summoning, under the provisions of the statute, a sufficient number of persons to act as jurors in any case. *Tremblay v. State*, 20 Kan., 116; Crim. Code, § 208.

Several other exceptions are presented in the briefs, but we do not think it necessary to notice them particularly. We have examined all the questions submitted, and find no error affecting the substantial rights of the parties, except the one noticed in the Teft case. Crim. Code, § 293. No reference is made in the briefs of defendants concerning the costs taxed in the cases, and therefore we omit further mention thereof. *Wilson v. Fuller*, 9 Kan., 176; *Powers v. Kindt*, 13 id., 74.

The judgments in all the cases, except No. 3612, will be affirmed. The judgment in that case, *State v. Teft*, will be reversed, and the cause remanded for a new trial.

(All the justices concurring.)

STATE v. JOHN O'NEIL.

SAME v. JOHN O'NEIL.

SAME v. FOUR JUGS OF INTOXICATING LIQUOR: NATIONAL EXP.
Co., Claimant.

SAME v. SIXTY-EIGHT JUGS, ETC.: NATIONAL EXP. Co., Claimant.

(58 Vt., 140.)

INTOXICATING LIQUORS: Sale — Intention — Constitutional law — Confiscation — Interstate commerce — Former conviction — Excessive punishment.

1. **PRINCIPAL AND AGENT — GOODS SENT C. O. D.**— Where a merchant receives an order for goods, and ships the same C. O. D., the carrier becomes the agent of the seller for the purpose of delivering the goods and collecting the price, if accepted; otherwise to hold them subject to the seller's order.¹
2. **SALE OF GOODS — INTENTION OF THE PARTIES.**— Whether or not, and when, the legal title passes on the sale of goods or merchandise from the vendor to the vendee, depends upon the intention of the parties, and is to be gathered from their acts, and all the facts and circumstances in the case.
3. **CONDITION PRECEDENT.**— Where there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until there has been a performance or a waiver of the condition; and where goods are sent C. O. D. the title does not pass until they are accepted and paid for.
4. **INTOXICATING LIQUORS — KEPT FOR UNLAWFUL PURPOSES — CONFISCATION.**— Section 2 of No. 43 of the acts of 1882 (Vermont), providing for the confiscation of intoxicating liquors kept and intended for unlawful use, is within the police powers delegated to the legislature by article 5, part 1, of the constitution, and is valid.
5. **CONSTITUTIONAL LAW — INTERSTATE COMMERCE.**— Aforesaid act of 1882 is neither an attempt to regulate commerce between the states nor repugnant to section 8 of the federal constitution.
6. **VIOLATION OF LIQUOR LAWS — FORMER CONVICTION.**— The provision that all persons charged with a violation of the liquor laws shall be prosecuted within three years does not apply to past convictions of a violation of these laws; and the fact that the former conviction was more than three years prior to a present prosecution cannot avail one prosecuted for a second violation.
7. **EXCESSIVE PUNISHMENT.**— Where a person has been convicted of three hundred and seven offenses against the liquor laws, and sentenced to pay a fine of \$20 for each offense, and to one month's imprisonment, the constitutional inhibition of cruel and unusual punishment, or excessive fines or bail, has no application.

¹ See note at end of case.

Exceptions from Rutland County.

These cases were heard together. The first two were proceedings commenced before a justice of the peace, for the confiscation of intoxicating liquors, shipped from several towns in New York to Rutland parties who had ordered them, and were marked "C. O. D.," and which were seized at the offices of the National Express Company, in Rutland, and in Center Rutland, by the sheriff of the county and one of his deputies, under the authority of No. 43 of the acts of 1882, section 2 of which is as follows: "In all cases where now, by any of the provisions of said chapter [169, Rev. Laws], an officer is authorized to seize intoxicating liquors, or the casks or vessels containing the same, by virtue of a warrant therefor, he may seize the same without a warrant, and keep the liquors, casks or vessels so seized in some safe place, and shall forthwith procure such warrant, and he shall thereupon make return of his doings under said warrant in the same manner as he would have done had the issuing of the warrant preceded such seizure." The National Express Company appeared before the justice of the peace and made claim to the several packages of liquor, claiming that the sales in question were made in New York, where such sales were lawful, and that the seizure in question was a violation of section 8 of the United States constitution, and several other claims, as appear in the opinion. Judgment having been rendered against the express company upon their claim to the liquors, and the same having been ordered to be confiscated, both before the justice and the county court, the express company took these cases to this court for determination. The other two cases were criminal prosecutions begun before a justice of the peace — one for keeping intoxicating liquors in Vermont with intent to sell and furnish the same, contrary to law, and the other for selling and furnishing intoxicating liquors in Vermont contrary to law. The respondent is a wholesale liquor dealer in Whitehall, New York. The sales complained of were all upon orders received by O'Neil from parties in Rutland, and sent C. O. D. to such parties in Rutland through the National Express Company, where payment therefor was made to the express company. The respondent was found guilty, on the complaint for keeping, of one offense as of second conviction, the punishment for which is \$20 and

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one month's imprisonment, and on the complaint for selling, of three hundred and seven offenses as of second conviction, the punishment for which is \$6,140 (\$20 for each offense), together with one month's imprisonment; and in both cases, if the fine is not paid within twenty-four hours, the respondent is to be committed to the house of correction for three times the number of days as there are dollars of costs and fines, which alternative sentence is in addition to the month's imprisonment. The respondent claimed that the judgment should be only as of the first conviction, in which case the fine is only \$10 for each offense without the month's imprisonment, because the record of the first conviction offered in evidence was more than three years before the commencement of the present complaint, and the statute provides that all prosecutions for violations of the liquor law must be commenced within three years.

W. C. Dunton and L. H. Thompson, for the state.

J. C. Baker, for the respondent.

Prout & Walker, for the claimant.

RORCE, C. J. The first and most important question presented by these cases is whether or not the intoxicating liquors in question were (in the first two cases), in contemplation of law, sold or furnished by the respondent in the county of Rutland and state of Vermont; or (in the last two cases) held and kept for the purpose of sale, furnishing, or distribution contrary to the statute, within said county and state. The answer depends upon whether the National Express Company, by which some of said liquors were delivered to the consignees thereof, and in whose possession the remainder were found and seized before delivery, was in law the agent of the vendors or of the vendees. If the purchase and sale of the liquors was fully completed in the state of New York, so that upon delivery of them to the express company for transportation the title vested in the consignees, as in the case of a completed and unconditional sale, then no offense against the laws of this state has been committed. If, on the other hand, the sale, by its terms, could only become complete so as to pass the title in the liquors to the consignees upon the doing of some act or the fulfilling of some condition precedent after they had reached Rutland, then the rulings of the county court upon the question of the offense were correct.

The liquors were ordered by residents of Vermont from dealers doing business in the state of New York, who selected from their stock such quantities and kinds of goods as they thought proper, in compliance with the terms of the orders, put them up in packages, directed them to the consignees, and delivered them to the express company as a common carrier of goods for transportation, accompanied with a bill or invoice, for collection. The shipment was in each instance, which it is necessary here to consider, "C. O. D.," and the cases show that the effect of the transaction was a direction by the shipper to the express company not to deliver the goods to the consignees except upon the payment of the amounts specified in the C. O. D. bills, together with the charges for the transportation of the packages and for the return of the money paid. This direction was understood by the express company, which received the shipments coupled therewith. Whether or not, and when, the legal title in property sold passes from the vendor to the vendee is always a question of the *intention* of the parties, which is to be gathered from their acts, and all the facts and circumstances of the case taken together. In order that the title may pass, as was said by Morton, J., in *Mason v. Thompson*, 18 Pick., 305, "the owner must intend to part with his property, and the purchaser to become the immediate owner. Their two minds must meet on this point, and if anything remains to be done before either assents, it may be an inchoate contract, but it is not a perfect sale." The authorities seem to be uniform upon this point; and the acts of the parties are regarded as evidence by which the court or jury may ascertain and determine their intent. Benj. Sales, §§ 311, 319, note *c*. Where there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until performance or waiver of the condition, even though there be an actual delivery of possession. Benj. Sales, § 320, note *d*. The Vermont cases to the above points are referred to in Robert's Digest, 610 *et seq.*, and need not be specially reviewed here.

In the cases under consideration the vendors of the liquors shipped them in accordance with the terms of the orders received, and the mode of shipment was as above stated. They delivered the packages of liquors, properly addressed to the

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several persons ordering the same, to the express company, to be transported by that company, and delivered by it to the consignees upon the fulfillment by them of a specified condition precedent, namely, payment of the purchase price and transportation charges, and not otherwise. Attached to the very body of the contract, and to the act of delivery to the carrier, was the condition of payment before delivery of possession to the consignee. With this condition unfulfilled and not waived, it would be impossible to say that a delivery to the carrier was *intended* by the consignor as a delivery to the consignee, or as a surrender of the legal title. The goods were intrusted to the carrier to transport to the place of destination named, there to present them for acceptance to the consignee, and *if* he accepted them, and paid the accompanying invoice and the transportation charges, to deliver them to him; otherwise to notify the consignor, and hold them subject to his order. It is difficult to see how a seller could more positively and unequivocally express his intention *not* to relinquish his right of property or possession in goods until payment of the purchase price than by this method of shipment. We do not think the case is distinguishable in principle from that of a vendor who sends his clerk or agent to deliver the goods, or forwards them to, or makes them deliverable upon the order of, his agent, with instructions not to deliver them except on payment of the price or performance of some other specified condition precedent by the vendee. The vendors made the express company their agent in the matter of the delivery of the goods, with instructions not to part with the possession of them except upon prior or contemporaneous receipt of the price. The contract of sale therefore remained inchoate or executory while the goods were in transit, or in the hands of the express company, and could only become executed and complete by their delivery to the consignees. There was a completed executory *contract* of sale in New York; but the completed *sale* was, or was to be, in this state.

The authorities upon the above points and principles are so numerous, and are so fully collated in the brief of the learned counsel for the state, and in the text and notes of 2 Benj. Sales (4th Amer. ed.), that we refrain from specific references in support of the conclusions at which we have arrived.

These are fully supported by the decision of the United

States district court in Illinois, in *People v. Shriver*, 31 Alb. L. J., 163, a case involving precisely the same question. Treat, J., says in the opinion: "In the case of liquor shipped by the defendant to Fairfield by express, C. O. D., the liquor is received by the express company at Shawneetown as the agent of the seller, and not as the agent of the buyer, and on its reaching Fairfield it is there held by the company as the agent of the seller until the consignee comes and pays the money, and then the company, as the agent of the seller, delivers the liquor to the purchaser. In such case the possession of the express company is the possession of the seller, and generally the right of property remains in the seller until the payment of the price. An order from a person in Fairfield to the defendant at Shawneetown for two gallons of liquor to be shipped to Fairfield, C. O. D., is a mere offer by the person sending such order to purchase two gallons of liquor from the defendant, and pay him for it when he delivers it to him at Fairfield; and a shipment by the defendant according to such order is practically the same as if the defendant had himself taken two gallons of liquor from his store in Shawneetown, carried it in person to Fairfield, and there delivered it to the purchaser, and received the price of it. It would be different if the order from Fairfield to the defendant was a simple order to ship two gallons of liquor by express to the person ordering, whether such order was accompanied by the money or not. The moment the liquor, under such an order, was delivered to the express company at Shawneetown, it would become the property of the person ordering, and the possession of the express company at Shawneetown would be the possession of the purchaser,—the sale would be a sale at Shawneetown,—and if it were lost or destroyed in transit the loss would fall upon the purchaser. But in the case at bar, by the shipping of the liquor to Fairfield, C. O. D., the defendant made no sale at Shawneetown. The right of property remained in himself, and the right of possession, as well as the actual possession, remained in him through his agent. Had it been lost or destroyed in transit, the loss would have fallen upon himself. He simply acted upon the request of the purchaser, and sent the liquor to Fairfield by his own agent, and there effected a sale by receiving the money and delivering the liquor."

2. It is insisted on the part of the claimant in the case of

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The State v. Sixty-eight Jugs, etc., that section 2 of No. 43 of the Acts of 1882, under which the liquors in that case were seized, is unconstitutional. Conceding the points contended for by the learned counsel for the claimant, that there is a well-recognized right of property in intoxicating liquors, that they are not *malum in se*, and that their use is not by law prohibited to citizens in this state, these propositions are nevertheless clearly subject to the qualification that, *when kept and intended for unlawful use*, such liquors fall at once under the ban of the law and become subject to seizure and confiscation by such methods as are provided by law in conformity with the constitution. That intoxicating liquors, when once branded with this unlawful intent on the part of the owner or possessor, become subject to confiscation by the government, and that the methods and means of their seizure and condemnation are within the police powers delegated to the legislature by article 5, part 1, of the constitution, is too well settled in this state and elsewhere to require extended discussion. *Spalding v. Preston*, 21 Vt., 9; *State v. Conlin*, 27 Vt., 318; *id.*, 323, 327; *State v. Comstock*, *id.*, 553; *Gill v. Parker*, 31 Vt., 610; Potter's Dwar., ch. 14; Cooley, Const. Lim. (4th ed.), 714, 727.

This section gives the officer power to seize, without warrant, liquor found "under circumstances warranting the belief that it is intended for sale or distribution" contrary to the provisions of chapter 169, R. L. It does not purport to confer the power of search; nor does anything appear to show that the officer assumed to exercise such power in this case. It simply provides for the seizure, without warrant previously issued, of something which the law has declared subject to seizure and condemnation, under the police power delegated by the constitution, as an instrument intended by the owner or possessor for a use unlawful by express statute, and dangerous to the peace, health and good morals of the community. That the article *in itself* may be innocuous may be the subject of lawful ownership, or may be even susceptible of beneficial use, can no more affect the question than could the fact that certain tools were susceptible of lawful and beneficial use in mechanics save them from becoming subject to seizure and confiscation if intended by their owner or possessor for use as the instruments for accomplishing a contemplated burglary; or the harmless

character of the metal, and its owner's right of property therein, to protect his ownership when fashioned and intended for passing as counterfeit coin. It cannot be doubted in this state since the case of *Spalding v. Preston*, 21 Vt., 9, and has not been elsewhere, so far as we are aware, that articles or instrumentalities once impressed with the characteristic of *adaptation* and *intended use* for purposes prohibited by law, and contrary to the public peace, health or morals, are subject to summary seizure under statutory or even general police regulations. That the liquors in question were intended for such use has been determined in this case as a question of fact by the tribunal designated by law, and that adjudication is conclusive.

The scope and application of article 5, part 1, of the constitution have been defined by this court in the cases above referred to, and in *Re Powers*, 25 Vt., 265, which has ever since been regarded as conclusive against such application of that section of the bill of rights as is here contended for by the claimant. See *Gill v. Parker*, 31 Vt., 610; *State v. Peterson*, 41 Vt., 504; *State v. Intoxicating Liquor*, 55 Vt., 82. In Massachusetts a statute practically identical with the one in question has been held not to contravene a similar constitutional provision. *Jones v. Root*, 6 Gray, 435; *Mason v. Lothrop*, 7 Gray, 354. The decisions in Maine are to the same effect. *State v. McCann*, 59 Me., 383; *State v. Howley*, 65 Me., 100

3. Concerning the claim that section 8 of the federal constitution, conferring upon congress the exclusive right to regulate commerce among the states, has application, it is sufficient to say that no regulation of or interference with interstate commerce is attempted. If an express company, or any other carrier or person, natural or corporate, has in possession within this state an article in itself dangerous to the community, or an article intended for unlawful or criminal use within the state, it is a necessary incident of the police powers of the state that such article should be subject to seizure for the protection of the community. It would certainly be a strange perversion of language to claim that if this express company were to hold in possession within this state clothing infected with the small-pox or yellow fever, or tools with which it was intended to commit a burglary, the state government should be powerless

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to protect its citizens by seizing and rendering harmless such articles, simply because they might have been brought in the ordinary course of business from another state. If the express company has in possession within the state liquor, *with intent to make unlawful use or disposition of it*, then the right to seize it and prevent such unlawful use attaches. If it were competent for persons or companies to become superior to state laws and police regulations, and to override and defy them, under the shield of the federal constitution, simply by means of conducting an interstate traffic, it would indeed be a strange and deplorable condition of things. The right of the states to regulate the traffic in intoxicating liquors has been settled by the United States supreme court in the *License Cases*, 5 How., 577.

4. Proof of the former conviction in the cases of *State v. O'Neil* was properly admitted, notwithstanding the conviction appeared to have been more than three years before the trial. No provision of the statute requires that the former conviction must have been within three years, and we have no authority to add such a provision to the law, as it is plainly and unambiguously framed by the legislature. The reason for the limitation of prosecutions for the offenses charged in these cases to a period within three years from the time of commission, as for all similar limitations, is that a person should not be called upon to answer to a legal accusation after such a long time has elapsed as would, in the estimation of the law, make it difficult or impossible, by reason of the death or removal of witnesses, the loss or destruction of evidence, or the various embarrassments likely to arise from a considerable lapse of time, for him to establish his innocence. This reason has no application to a case where the only proof that can be used on the one side or the other is matter of record. We should, therefore, have no justification, even if we deemed it within the scope of our power and duty, for making application of a rule of limitation by analogy in these cases.

5. The constitutional inhibition of cruel and unusual punishments, or excessive fines or bail, has no application. The punishment imposed by statute for the offense with which the respondent O'Neil is charged cannot be said to be excessive or oppressive. If he has subjected himself to a severe penalty

it is simply because he has committed a *great many* of such offenses. It would scarcely be competent for a person to assail the constitutionality of the statute prescribing a punishment for burglary, on the ground that he had committed so many burglaries that, if punishment for each were inflicted on him, he might be kept in prison for life. The mere fact that cumulative punishments may be imposed for distinct offenses in the same prosecution is not material upon this question. If the penalty were unreasonably severe for a *single* offense, the constitutional question might be urged, but here the unreasonableness is only in the number of offenses which the respondent has committed.

The inevitable deduction from what has been said under the first point is that the respondent O'Neil, by what he did in respect of the transactions in question, made the express company his agent; and, as what was done by such agent, in the execution of the authority and instructions directly given by him, committed offenses against the statute, O'Neil must be held responsible. That he was innocent of any purpose or intent to break the law, and was unaware that what he did was contrary to law, cannot avail him in defense. *State v. Comings*, 28 Vt., 508.

The result is that in the cases of *State v. O'Neil*, Nos. 27 and 28, the respondent takes nothing by his exceptions; and in the case of *State v. Intoxicating Liquor: National Express Company, Claimant*, Nos. 25 and 26, the judgments are affirmed.

NOTE.—It was recently held in *United States v. Cline*, 26 Fed. Rep., 515, that where a person who has secured a license to retail liquors at one town receives an order for a certain amount of designated liquors from a person residing at another town or place, and he fills such order by taking or sending the liquor desired to such party, and collects the price therefor at the time of delivery, he is guilty of a violation of the revenue laws prohibiting the sale of liquor without license.

Judge Dick says, in the course of the opinion, that "if a proposition of purchase is made by letter, and is accepted by a vendor, and he delivers the article purchased to a common carrier as directed by the purchaser, such delivery completes the contract of sale, and transfers title without payment of the price, as the common carrier is the agent of the purchaser, and the vendor only has the right of stoppage *in transitu* if the purchaser is ascertained to be insolvent. If a vendor delivers an article ordered to a common carrier, marked 'C. O. D.,' and directed to an intended purchaser,

the contract of sale is completed at the place of delivery to the purchaser on the payment of the price, as the common carrier is the agent of the vendor for the purposes expressed, and the ownership of the property set apart for the purchaser does not pass to him until he pays the price."

STATE v. DODGE.

(78 Me., 430.)

INTOXICATING LIQUORS: *Sale of — Indictment — Nuisance.*

An indictment charging a person with keeping and maintaining "a building occupied by himself as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," is not sufficient to bring the offense within the statute against nuisances. R. S. Me., ch. 17, § 1.¹

On Demurrer from Supreme Judicial Court, Waldo County.

This was an indictment brought under Revised Statutes, chapter 17, section 1, which is as follows:

"All places used as houses of ill fame, or for the illegal sale or keeping of intoxicating liquors, or resorted to for lewdness or gambling; all houses, shops, or places of resort where intoxicating liquors are sold for tipping purposes; and all places of resort where intoxicating liquors are kept, sold, given away, drank, or dispensed in any manner not provided by law,—are common nuisances."

The indictment charged the respondent with keeping and maintaining "a common nuisance, to wit, a certain building . . . occupied by the said Manley Ellis Dodge as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," etc. The respondent filed a demurrer to the indictment, which was overruled by the presiding judge, and he thereupon alleged exceptions.

Orville D. Baker, attorney-general, and *R. W. Rogers*, county attorney, for the state.

Wm. H. Fogler, for the defendant.

DANFORTH, J. This case presents the question as to the sufficiency of an indictment founded upon Revised Statutes, chap-

¹ See note.

ter 17, section 1. If sustained, it must be under the first clause of the section, which, so far as necessary for the case, reads as follows, viz.: "All places used . . . for the illegal sale or keeping of intoxicating liquors," are common nuisances. By section 2 the keeper or maintainer of such nuisance shall be punished by fine or imprisonment. The material part of the indictment charges that the defendant "did keep and maintain a common nuisance, to wit, a certain building . . . occupied by the said Manley Ellis Dodge as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," etc.

The statute declares buildings used for illegal sale or keeping, etc., nuisances. The indictment alleges that the building was resorted to for that purpose. It is claimed that the two expressions mean the same thing. This cannot be. Neither word has any technical meaning attached to it. Both must therefore be construed in their ordinary and usual signification. The building may be and is used by the occupant or keeper. It is resorted to by other persons. If used for sales it must be understood that sales are made by the keeper, or under his authority. If resorted to for that purpose, sales may or may not be made; and, if made, are supposed to be made by the persons so resorting, and here is no allegation that any sales were made, or, if so, that they were made by the consent, or knowledge even, of the defendant. He is charged with keeping a saloon and shop. Other persons are charged with resorting to it for the purpose of illegal sales. If such sales are made, the evil may be as great as though made by the keeper. But this is not the offense provided by the statute. Besides, he is not charged with keeping the building for any such purpose, and should not be punished for the wrong of others. *Com. v. Stahl*, 7 Allen, 304.

The case of *State v. Lang*, 63 Me., 215, relied upon in support of the indictment, is not in point. It does not hold that the phrases "resorted to" and "used for" are of the same meaning, but rather that the proper construction of the statute under which that indictment was found required the insertion of the words "used for" before the words "illegal sale," and not the words "resorted to," and hence the words "used for" were properly used in the indictment as more accurately ex-

pressing the intention of the statute. Since then the statute had been changed so as to leave no doubt that the construction then given is the true one, and the indictment in the case at bar should have followed that. *Com. v. Howe*, 13 Gray, 26.

Exceptions and demurrer sustained. Indictment adjudged bad.

PETERS, C. J., WALTON, EMERY, FOSTER and HASKELL, JJ., concurred.

NOTE.—When the place where intoxicating liquors are unlawfully sold is described, in an information charging an offense under the prohibitory liquor law, as follows: "In the south portion of a certain connected row of frame buildings fronting east on Spruce street, between North Second street and North Third street, in the city of Abilene, in said Dickinson county and state of Kansas,"—and no motion is made to quash the information, and the alleged indefiniteness of the description is raised only by objection to the introduction of evidence, and thereupon the court construes the description in the information to refer "to the south building of the connected row of frame buildings fronting east on Spruce street, between North Second street and North Third street, in the city of Abilene," and limits the evidence to the extreme south building of the connected row of frame buildings, *held*, that the description in the information, as construed and limited, is sufficient. *State v. Rohrer*, 34 Kan., 427.

HEATH v. STATE.

(105 Ind., 342.)

INTOXICATING LIQUORS: *Selling without license—License to one no protection to another.*

SELLING LIQUOR WITHOUT LICENSE—LICENSE TO ONE NO PROTECTION TO ANOTHER.—A license issued to one man to sell intoxicating liquor at a certain place affords no protection to another who has purchased such place, and sold intoxicating liquor thereat.

From the Allen Circuit Court.

T. E. Ellison, for appellant.

C. M. Dawson, prosecuting attorney, for the state.

NIBLACK, C. J. Upon an appeal from the judgment of a justice of the peace the appellant, Benjamin F. Heath, was tried

and convicted of selling to one Groves, on the 15th day of December, 1885, intoxicating liquor, to be drunk on the premises, without a license authorizing such a sale. The only question made upon this appeal is upon the sufficiency of the evidence to sustain the finding of the circuit court. It was admitted by the appellant at the trial that he sold intoxicating liquor to Groves, at the time and place and for the purpose charged in the affidavit filed against him; that on the 9th day of July, 1885, one Charles B. Smith obtained a license from the board of commissioners of Allen county to sell spirituous, vinous and malt liquors at the place at which the appellant sold the intoxicating liquor, for the period of one year from that date; that the building in which Smith commenced to do business under his license belonged to one Dudenhoefer, and was by him leased to Smith; that on the 31st day of August, 1885, Smith gave to one Dennis a chattel mortgage on all the fixtures and furniture in his saloon, to secure the payment of the sum of \$83.35, to be paid in one month, which time was afterwards extended for another month; that in October, 1885, Smith having become indebted to Dudenhoefer in the sum of \$45 for rent, the latter declared the lease to Smith forfeited; that on the 25th day of November, 1885, Dudenhoefer commenced a suit against Smith before a justice of the peace, to evict him from the premises, which consisted of a dwelling-house, in which the latter lived, and the saloon, and on the same day sold and conveyed the property to one Evans; that on the 2d day of December, 1885, Dudenhoefer recovered a judgment for the possession of the property, and \$10.50 in damages; that on the 3d day of December, 1885, a writ was issued to a proper constable, commanding him to put Smith out of possession, and to collect the amount of damages and costs adjudged against him; that the constable took possession of the saloon, levied upon the fixtures and furniture in it, and, locking it up, gave the key to Dudenhoefer's attorney. It was also made to appear by the evidence that on the next day,—that is to say, on the 4th day of December, 1885,—Evans, Smith and Heath came together and entered into an arrangement to have the saloon reopened and business continued in it in Smith's name. To that end Evans executed to Smith a written lease to the premises for one month, with the privilege of renewal from month to month, upon payment of

the rent in advance, until the 1st day of July, 1886. Smith and Heath thereupon entered into an agreement in writing, as follows:

"FORT WAYNE, Ind., December 4, 1885.

"I, Charles B. Smith, of Allen county, Indiana, do hereby hire and employ Benjamin F. Heath to act as my bar-keeper till the 1st of July, 1886, at my saloon, No. 401 East Wayne street, in said city of Fort Wayne. I do also authorize him to purchase such goods as may reasonably be necessary to carry on said business, and to give receipts and sign my name to such contracts as may be necessary to carry out this contract. And I do further agree to sell and deliver to him all the (fixtures) and furniture there is now in said premises for the sum of \$70, the receipt of which is hereby acknowledged; it being agreed that said Heath shall act as such bar-tender, and shall procure such assistance as may be necessary, at his own expense, to properly carry out this contract. And said Heath shall faithfully carry out this contract and save said Smith from prosecutions on account of such employment; that he keep an orderly house, sell no liquors to minors, or to persons intoxicated, or to habitual drunkards, or in any manner prohibited by law. It is also agreed that said Heath shall, out of the receipts of said business, pay all bills incurred on account thereof, and that he shall have for his services all profits made in carrying on the same, and any and all liquors or goods bought by him on my account, when the same are paid for, except the sum of \$10 per month, which is to be paid to B. B. Evans for the use of said saloon by said Heath on the account of said Smith, said Evans having this day leased the same to said Smith.

"In witness whereof, said parties have hereunto set their hands the day and year above written.

"CHARLES B. SMITH.

"December 4, 1885.

B. F. HEATH.

"I agree that said Benjamin F. Heath shall honestly and faithfully carry out his part of the above contract.

"BENNETT B. EVANS."

Smith testified that he sold the fixtures and furniture in the saloon to Heath for \$70; that Evans furnished the money, which was turned over to Dudenhoefer in payment of his rent

and judgment for damages and costs; that Evans paid and took up the chattel mortgage executed to Dennis; that soon after signing the agreement with Heath, he had moved over into another part of the city, and had not since been in the saloon exceeding once or twice, if at all, as to which he could not remember; that after signing the agreement, Heath got the key from Dudenhoefer's attorney, and went into the possession of the saloon, assuming and continuing to be in entire control; that there was at the time probably \$10 worth of liquors in the saloon; that he, Smith, was not to get anything out of the business except \$10, which was to be paid to Evans for rent; that he considered himself the owner of the liquors in the saloon, but Heath was to have all he paid for; that he considered himself responsible for the acts of Heath while carrying on business under the contract under which he went into possession, but that he had no property which amounted to anything, and was in fact entirely insolvent; that at the time he was put out of the possession of the saloon he was in debt, and had no money and could not have run the saloon any longer, and that he entered into the agreement with Heath at the request of Evans, who wanted Heath to run the saloon; that nothing was said at the time of the agreement about his transferring his license to Heath; that he did not know what liquor, if any, Heath had since bought; and that he had given himself no trouble about the business since Heath had taken charge of the saloon. Evans and Heath also testified as witnesses in the cause, but their testimony was in general corroboration of the statements made by Smith as above, and contained nothing changing the general character of the transaction which resulted in placing Heath in possession of the saloon.

While the agreement set out and relied upon in this case is very similar to the one ruled upon and held to be a valid agreement upon its face, in the case of *Runyan v. State*, 52 Ind., 320, the circumstances attending as well as succeeding its execution tended to prove it to have been a mere cover for the absolute sale and transfer of the saloon to Heath. In finding the defendant guilty, the circuit court evidently construed the entire transaction as amounting to an absolute sale and transfer of the saloon, and not as the mere appointment of Heath as the bar-keeper and agent of Smith, and we have no reason for

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holding that the construction thus placed upon the evidence was an incorrect construction. Conceding, therefore, that Heath had become the actual owner of the saloon, as the evidence tended to show he had, the license issued to Smith afforded him no protection for making the sale of intoxicating liquor admitted to have been made in this case. *Pickens v. State*, 20 Ind., 116; *Krant v. State*, 47 Ind., 519; *Shaw v. State*, 56 Ind., 188; *Keiser v. State*, 58 Ind., 379.

The judgment is affirmed, with costs.

THE STATE v. HAYES.

(67 Ia., 27.)

INTOXICATING LIQUORS: *Trial without plea — Nuisance — Intent.*

1. CRIMINAL PROCEDURE — TRIAL WITHOUT PLEA.— Where a defendant is put on trial without plea to the indictment having been entered, it is a mere technical error or irregularity which does not affect any of the substantial rights of the defendant, and affords no ground for reversal.
2. NUISANCE — INTENT — SALE BY CLERK.— Under the code of Iowa (secs. 1525, 1540, 1542, 1543), a person is not guilty of nuisance on account of the unlawful sale of liquor in his store by his clerk, unless he occupies the place or carries on the business for the purpose of making such sales. An unlawful intent on his part is an essential ingredient of the crime.¹

Appeal from Story District Court.

The defendant was accused, by indictment, of the crime of nuisance. He was tried by a jury and found guilty, and the court sentenced him to pay a fine and the costs of the prosecution, and from this judgment he appeals.

F. D. Thompson, for appellant.

A. J. Baker, attorney-general, for the state.

REED, J. 1. The indictment was returned on the 23d day of August, 1883. Afterwards, during the same term of court,

¹ See note.

defendant appeared and waived the arraignment, and further time was given him within which to plead, and the cause was continued. At the next term defendant was put upon his trial. It does not appear from the record that he ever pleaded to the indictment. The cause was tried, however, in every respect as though a plea of not guilty had been entered. It is now insisted that the court erred in placing the defendant on trial without a plea to the indictment having been entered. The case, in this respect, is like *State v. Greene*, 66 Ia., 11; (*S. C.*, *post*), in which we held that the error in putting the accused on trial without a plea having been entered was a mere technical error or irregularity, which did not affect the substantial rights of the parties, and afforded no ground for reversing the judgment. We are satisfied with the correctness of our holding in that case, and, under the rule there laid down, we cannot disturb the judgment in the present case on this ground.

2. It is charged in the indictment that defendant occupied and used a building and place in which he kept intoxicating liquors, with intent to sell the same contrary to law. It was proven on the trial that defendant was engaged in the business of keeping a drug-store. Also that he was a registered pharmacist, and that he held a permit from the board of supervisors of the county authorizing him to sell intoxicating liquors for medicinal, mechanical, culinary and sacramental purposes. It was also proven that he kept intoxicating liquors in his store, and that numerous sales of such liquors had been made in the place. Some of these sales were made by the defendant in person, while others were made during his absence from the store by a clerk or salesman in his employ. Defendant was examined as a witness in his own behalf, and testified that he kept the liquors which were in his store with intent to sell the same strictly as medicine, and that all sales made by him in person were made on the representations by the purchasers that they desired the liquors for medicinal purposes only. The court instructed the jury that "if the owner or proprietor of any building or place in which intoxicating liquors are unlawfully kept or sold employs any clerk, servant, agent or bartender, or other employee, in conducting or managing, or aiding to conduct or manage, the business of keeping or sell-

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ing such intoxicating liquors, the owner or proprietor is equally liable for his own unlawful acts, and for the acts of his servant, clerk, agent, bar-tender, or other employee, in keeping or selling such liquors unlawfully."

One proposition involved in this instruction is that if the owner or proprietor of the building or place is engaged in the business of selling intoxicating liquors contrary to law, or keeping them with intent to so sell them, he is criminally liable for the unlawful acts of his servant or agent done in the course of the business. The soundness of this proposition cannot be doubted. But an unlawful sale of intoxicating liquors may be made by an agent or servant when such liquors are kept by the principal only for lawful purposes. This would be the case where the principal held a permit to sell for medicinal, mechanical, culinary and sacramental purposes, and kept the liquors with intent that they should be sold only for those purposes, and his agent or clerk should, without his knowledge or authority, make sales of such liquors for other purposes. Under the evidence in this case, the jury might have found that very state of facts, and the instruction, we think, authorized them to convict the defendant on proof of that state of facts.

The question, then, is whether defendant, if he kept the liquors with intent that they should be sold only for lawful purposes, and himself made only lawful sales of such liquors, is criminally liable on account of unlawful sales thereof by his clerk. The offense of which defendant is accused is defined by section 1543 of the code, which is as follows: "In cases of the violation of the provisions of the three preceding sections or of section 1525 of this chapter, the building or erection of whatever kind, or the ground itself in or upon which such unlawful manufacture or sale, or keeping with intent to sell, of intoxicating liquors is carried on or continued or exists, is hereby declared a nuisance, and may be abated as the law directs. And, in addition to the penalties prescribed in said sections, whoever shall erect or establish or continue or use any building, erection, or place for any of the purposes prohibited in said sections shall be deemed guilty of a nuisance, and may be prosecuted and punished accordingly in the manner

provided by law. . . ." The preceding sections to which reference is made are those which prescribe the penalties which shall be inflicted for the manufacture or sale, or keeping for sale, of intoxicating liquors contrary to the provisions of the chapter. Section 1540 provides that if any person, by himself or by his agent or servant, shall sell any intoxicating liquors contrary to the provisions of the chapter, he shall be deemed guilty of a misdemeanor, and shall be punished by fine and imprisonment; and section 1542 prescribes a penalty for owning or keeping such liquors with intent to sell the same contrary to law.

It will be observed that the first provision of section 1543, quoted above, defines the conditions or circumstances which will render the building or place a nuisance, and subject it to abatement, and that the following provision points out the particular acts which will subject the person committing them to the punishment prescribed by law for the crime of nuisance. The building or erection is rendered a nuisance by the act of keeping intoxicating liquors in it, with intent to sell the same contrary to law, or by the unlawful sale there of such liquors. And it is not doubted that it may be rendered a nuisance by the unauthorized act of the agent or servant of the proprietor or owner in selling intoxicating liquors in it contrary to law, when the motives and intentions of the proprietor are all lawful. But by the other provision the owner or proprietor is subjected to the punishment prescribed by law for the crime of nuisance, when he uses or occupies the building or place "for any of the purposes prohibited in said sections;" that is he is guilty of the offenses if he uses or occupies the place for the purpose of keeping intoxicating liquors with intent to sell the same contrary to law, or if he occupies it for the purpose of selling such liquors contrary to law. Now, it cannot be said that he occupies it for a particular purpose, unless he intends to accomplish that purpose by occupying it. He does not occupy it for the purpose of selling intoxicating liquors contrary to law unless he intends to sell such liquors unlawfully. He is not, therefore, guilty of the crime of nuisance on account of the unlawful sales of liquor in his store by his clerk unless he occupies the place, or carries on the business, for the pur-

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pose of making such sales. In other words, an unlawful intent on his part is an essential ingredient of the crime.

We think, therefore, that the instruction is erroneous, and the judgment is accordingly reversed.

NOTE.—Upon a complaint charging that the defendant unlawfully sold intoxicating liquors between the hours of 11 at night and 6 in the morning, if it is shown that the defendant gave strict orders to his servants that no sale should be made after 11 o'clock, and gave these instructions in good faith, intending them to be obeyed and enforced, and if a sale were made without his knowledge, he cannot be held guilty of the offense charged. *Com. v. Karl Wachendorf*, 141 Mass., 270.

Upon a complaint for the illegal sale of liquor, if the defendant kept and used the premises for the illegal sale or keeping of intoxicating liquors at any period of time, or on a single occasion, covered by the complaint, he is guilty of the offense charged, and it is not necessary to prove that he used it for the illegal purpose on other days, or at other times. *Com. v. Kerrisey*, 141 Mass., 110.

HILANDS v. COMMONWEALTH.

(111 Penn. St., 1.)

JEOPARDY: Murder — Plea — Error.

1. JEOPARDY.—Where, in a trial for a capital offense, the jury, after being impaneled and sworn, is, with the consent of the prisoner, allowed to separate, and afterwards discharged by the court on the ground that such separation was illegal, *held*, that the jury was not discharged under such extreme necessity as to subject the prisoner to be again put in jeopardy of his life for the same offense.¹
2. PLEA — FORMER JEOPARDY.—A plea of former jeopardy is allowable, after the jury is charged with the prisoner, and it is so charged when the twelve jurors are duly impaneled and sworn.

Error to the Court of Oyer and Terminer, Mercer County.

James W. Hilands was indicted for the murder of John Rich. A jury was impaneled and sworn, and the defendant placed in their charge about 10:20 P. M., March 12, 1885. The court adjourned until the next day; the prisoner was remanded to jail and the jury was allowed to separate by consent of the defendant and the commonwealth. On the next day the court discharged the jury, saying that their separation was illegal,

¹ See note.

and directing another jury to be impaneled and sworn. Defendant presented a plea of former jeopardy, which the court overruled,—exception by defendant. A new jury was called to try the case. Defendant still insisting upon his plea of former jeopardy, the jury returned a verdict of guilty in the first degree, and defendant was sentenced accordingly, whereupon he sued out this writ.

J. G. White and Stranahan & Bowser, for plaintiff in error.

G. E. Patterson, district attorney, and *Stewart & Cochran*, *contra*.

MERCUR, C. J. The main contention in this case arises under the first specification of error. After a jury had been selected and sworn in the case, and had been discharged without the consent of the defendant, he objected to the selection of another jury, and pleaded former jeopardy. The court refused to sustain the plea.

Article 5 of the amendments to the constitution of the United States, *inter alia*, declares: "Nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb."

Article 1, section 10, of the declaration of rights in the constitution of Pennsylvania declares "no person shall, for the same offense, be twice put in jeopardy of life or limb." This declaration of individual protection is not new to the people of this commonwealth. The identical language was in the constitution of 1790. It was retained in the amended one of 1838, and is repeated in the present constitution. It will be observed that the constitutional prohibition does not declare that a person shall not be twice tried for the same offense which involves his life or limb; but that he shall not be twice put in jeopardy. At what step in the prosecution is a person put in jeopardy, to which he shall not be subject the second time for the same offense? Undoubtedly when the trial begins in which he is charged with a capital offense. That begins when the jury is charged with the prisoner. It is so charged as soon as the twelve jurors are duly impaneled and sworn. They are sworn well and truly to try and true deliverance make between the commonwealth and the prisoner whom they have in charge.

The trial has then begun. The prisoner stands before them as his judges, with his life in their hands. *Com. v. Cook et al.*, 6 S. & R., 578; *Same v. Clue*, 3 Rawle, 498; *Peiffer v. Com.*, 3 Harris, 468; *McFadden v. Same*, 11 id., 12; *Alexander v. Same*, 9 Out., 2.

The jury are not only the judges of the facts in such a case, but also of the law. If they find the prisoner not guilty, although in clear mistake of the law, no court can review the correctness of that verdict and again put him in jeopardy for the same offense. Whether the verdict be on the commonwealth declining to give any evidence, or whether it be after a protracted trial and the testimony of many witnesses, the judgment thereon is equally conclusive.

In the present case, the court, of its own will and action, discharged the jury, after it had been duly sworn, impaneled and charged with the prisoner. His consent thereto was neither given nor asked for. This action of the judge was induced by the fact that, after the jury had been so duly charged, he had, on the previous evening, permitted it to separate by consent of the prisoner and of the commonwealth. The question now is, did that separation authorize the court to discharge that jury, and put the prisoner on trial before another jury on the same indictment? When the second jury was about to be called, and the prisoner informed of his right of challenge, his counsel filed a plea of former jeopardy. The court overruled the plea, holding that inasmuch as the discharge of the jury was by reason of its separation with the consent of the prisoner and the commonwealth, he could not on that account plead former jeopardy, and therefore refused to sustain the plea. No complaint is now made that the jury was permitted to separate; but the claim is that the separation did not impair the conclusive effect of their discharge. In other words, that the discharge from the first jeopardy was not under such an extreme and overwhelming necessity as to justify an entire disregard of the constitutional protection guaranteed to every person. The decisions of the different states are not in entire harmony as to the power of the court to discharge a jury after it is sworn in a criminal case. In some of them no clearly-defined distinction appears to have been made between capital offenses and those of lesser grade. It is not necessary to cite

them. In our own state we have a line of cases applicable to the discharge of a jury in capital offenses which control the case.

We will refer to some, and to the opinions of the able judges in deciding them. *Com. v. Cook et al., supra*, was a capital case, in which the court, without the consent of the prisoner, had discharged the jury by reason of their inability to agree on a verdict. The opinion is by Mr. Chief Justice Tilghman. He reviews the English decisions prior to the Revolution, and the American cases since, which relate to the power of the court to discharge a jury after they are sworn in a capital case, and then says: "I grant that in case of necessity they may be discharged; but, if there be anything short of absolute necessity, how can the court, without violating the constitution, take from the prisoner his right to have the jury kept together until they have agreed, so that he may not be put in jeopardy a second time?" He further adds: "I think myself safe in asserting that there is no evidence of any instance since William Penn obtained his charter from Charles II., in which a jury was discharged without the consent of the prisoner, in a capital case." He closes his opinion by saying: "For my own part, thinking that their blood would be upon us if they were convicted of murder in the first degree on a second trial in this court, I am of opinion that they should be discharged from this indictment." Mr. Justice Duncan also filed an opinion entirely concurring with the chief justice, and adds: "There is, at this day, a settled and uncontroverted rule that, in case of life or member, a jury sworn and charged cannot be discharged before they give a verdict, unless with the consent of the prisoner, and where it is for his benefit, or in cases of extreme necessity; and, if a jury is otherwise discharged, it clearly amounts to an acquittal of the prisoner."

The correctness of the law as declared in *Com. v. Cook et al.* was affirmed in *Com. v. Clue, supra*, in an opinion by Mr. Chief Justice Gibson. In discussing the justice and reason of the rule he says: "Why it should be thought that the citizen has no other assurance than the arbitrary discretion of the magistrate for the enforcement of the constitutional principle which protects him from being twice put in jeopardy of life or member for the same offense I am at a loss to imagine. If discre-

tion is to be called in, there can be no remedy for the most palpable abuse of it but an interposition of the power to pardon, which is obnoxious to the very same objection. Surely every right secured by the constitution is guarded by sanctions more imperative." In that case the first jury had been discharged, without the consent of the prisoner, by reason of the sickness of two of the jurors. This court, thinking the illness was produced by reason of the jurors being kept without food or refreshment, and believing if the same had been furnished the health of the jurors would have been sufficiently restored, held that there was no sufficient cause for their discharge, and that it was a bar to a second trial for the same offense.

McFadden v. Com., *supra*, was also a capital case. In the opinion of the court, by Mr. Chief Justice Black, he says: "A discharge of the jury in a capital case, after the trial has begun, is not a continuance of the cause. It is the end of it. And, for all purposes of future protection, it is the same to the prisoner as an acquittal, unless it was done with his own consent, or demanded by some overwhelming necessity, such, for instance, as the sickness or death of a juror."

In *Peiffer v. Com.*, *supra*, Mr. Chief Justice Gibson declared that "even the forms and usages of the law conduce to justice." The people of this commonwealth, in all of its organic laws, and with great tenacity, have applied this rule to trials by jury. Thus the constitution of 1776, framed by the convention over which Benjamin Franklin presided, declared, "trials shall be by jury as heretofore." As if to emphasize the thought, and make the right more secure, the constitution of 1790 changed the language, and declared "that trial by jury shall be as heretofore, and the right thereof remain inviolate." These precise words were retained in the constitution of 1838, and are repeated in the constitution of 1874. The question is, was it error to overrule the prisoner's plea of former jeopardy when he was called before the second jury? It may be conceded that a person on trial for a capital offense ought not to be asked to consent to a separation of the jury. *Peiffer v. Com.*, *supra*. To this conclusion the court came on the next day after permitting them to separate. The prisoner had not withdrawn his consent to that separation. He had not, and did not, interpose any objection to the continuance of his trial be-

fore that jury. If it had gone on before them, and he had been convicted of murder in the first degree, *non constat* that he would have assigned that separation to avoid the effect of the verdict. The commonwealth could not.

Under the indictment it was within the power of the jury to acquit the prisoner of murder, and to find him guilty of voluntary manslaughter only. If such were the verdict, and the prisoner assigned for error to the judgment the separation of the jury, we would apply the same rule that should be applied in case he had been indicted and tried for manslaughter only. *Moss v. Com.*, 15 Pittsb. Leg. Jour., N. S., 107. It is neither proven nor alleged that the jurors were subjected to any improper influence during their separation. If the conviction had been for the lesser grade, the separation of itself alone would not have been a fatal error. We are not able to understand how the consent of the prisoner to the separation of the jury from evening until morning justified their subsequent discharge. If his consent gave any validity to the separation, it remained in full force. He had not in any manner attempted to supersede or impair its effect. If his consent was of no validity, then the error in permitting the separation was that of the court, and the prisoner was not responsible therefor. The discharge of the jury was not caused by any improper conduct of the prisoner during the trial. He did not consent to it. It was the action of the court alone, and to retrieve what the court thought was its previous error. If the right to discharge the jury for an error made by the court existed at that stage of the trial, we cannot see why the same right might not again be invoked, if a similar error had been committed near the close of the trial. If the right to so discharge be conceded to exist, then a person may, for the same offense, be put in jeopardy of life for an indefinite number of times.

The great safeguard which the organic law has thrown around the prisoner cannot thus be set at naught to correct any error committed by the judge during the trial of the cause. Under all the facts in this case, we cannot concede any discretionary power in the court to thus strike down the constitutional right of every person on trial for a capital offense. It is better that one guilty man escape than to disregard the mandate of the constitution and establish a precedent which

might result in many unjust convictions in the future. The language of the constitution is imperative. The ablest judicial minds which have administered the law in this commonwealth have emphasized its protecting power. Yielding, then, to the clear command of the former, and adopting the construction put upon it by our predecessors on this bench, we do not find that the first jury was discharged under such extreme and overwhelming necessity as to subject the prisoner to be again put in jeopardy of his life for the same offense. It was clear error not to sustain the plea of former jeopardy, and also in putting the prisoner on trial before another jury for the same offense. He should have been discharged from the indictment.

The conclusion at which we have arrived makes it unnecessary to consider the other specifications of error.

Judgment reversed, and it is further ordered that the record be remanded with this opinion, setting forth causes of reversal, to the court of oyer and terminer of the county of Mercer for further proceedings.

GORDON, J., dissents.

NOTE.—*Jeopardy*.—In *Pizano v. The State*, 20 Tex. Ct. App., 139, it is held that it is not essential to the sufficiency of a plea of former jeopardy that a record of the proceedings on the former trial shall be perpetuated by a bill of exceptions.

"Former jeopardy is a constitutional and not a statutory defense to crime, and although the plea of former jeopardy is not one known to the statutory law of this state, and has no place assigned it in the regular order of pleading, it is a plea available to an accused, under the provision of the constitution, and may be interposed even after the jury has been impaneled and the plea of not guilty entered. The trial court, therefore, erred in striking out the defendant's plea of former jeopardy in this case, upon the ground that, being filed after the jury was impaneled and the plea of not guilty entered, it was filed too late.

"A definition of jeopardy to which this court adheres was announced in *Powell's Case*, 17 Tex. Ct. App., 345, as follows: 'When a person has been placed upon his trial upon a valid indictment for an offense involving life or liberty, in a competent court, and a competent jury has been impaneled, sworn and charged with his case, he is 'put in jeopardy' within the meaning of the constitutional provision, and from a repetition thereof upon the same indictment, or upon any other indictment for the same offense, this constitutional shield forever protects him. Wherefore, after jeopardy has once so attached, if without lawful authority the trial court discharges the

jury without his consent and before verdict, he cannot legally be again tried for the same offense."

Discharge of jury without defendant's consent.—A plea of former jeopardy is not sustained by the fact that, at a former trial of the same indictment, the trial judge, without the consent of the defendant, discharged the jury, after they had been out forty-six hours without coming to an agreement. *Brady v. The State*, 21 Tex. Ct. App., 659.

What constitutes.—Where a former information failed to charge the defendant with the commission of any crime, an instruction, on a trial under a subsequent information charging the defendant with burglary, that such former information did not constitute legal jeopardy, is proper. *People v. Clark*, 67 Cal., 99. See, also, *The People v. Dolan*, 4 Am. Cr. R., 308; *Adams v. The State*, id., 309; *State v. Parker*, 5 id., 339 and note.

RYAN v. THE COMMONWEALTH.

(80 Va., 385.)

JURISDICTION: *How the question may be raised*—*Construction of statutes.*

1. **JURISDICTION AND PROCEEDINGS.**—Questions of jurisdiction may be raised by demurrer; by motion for instructions; by motion in arrest of judgment, on general issue; and by writ of error.
2. **CONSTRUCTION OF STATUTES.**—Unless a statute by its language expressly or by necessary implication demands such construction, it will not be construed as repealing a previous statute, or as being retrospective.
3. **CASE AT BAR.**—Prior to act of January 31, 1884, incorporating the city of Roanoke, and to act of February 25, 1884, creating the hustings court of that city, the county court of Roanoke county had jurisdiction of all offenses committed within that county, which embraced what afterwards became the limits of that city. In May, 1884, in that hustings court, M. R. was indicted for the murder of her husband, who died January 27, 1884, within those limits. *Licet*, the hustings court had no jurisdiction over the offense.

(HINTON, J., absent.)

Opinion states the case.

G. W. Hansbrough, for the prisoner.

F. S. Blair, attorney-general, for the commonwealth.

FAUNTLEROY, J., delivered the opinion of the court.

This is a writ of error to a judgment of the hustings court of Roanoke city, rendered June 20, 1884, on an indictment against Marcella P. Ryan, charging her with the murder,

by poison, of P. H. O. Ryan, by which judgment the sentence of death was pronounced upon her.

An inspection of the record of the said judgment and proceedings in the case discloses that the said hustings court erred in several particulars, to wit:

In overruling the demurrer to the indictment, and to each count thereof, for want of jurisdiction; and in refusing to give the jury an instruction asked for by the prisoner, in the words and figures following, to wit: "The court instructs the jury that if from the evidence they believe that the offense in the indictment alleged against the prisoner was committed before the 31st day of January, 1884 (that is, before the passage of the acts of assembly creating the said city and the said court), then the jury shall find the prisoner *not guilty*, as charged in the indictment."

This instruction raises the question of the jurisdiction of the corporation court of Roanoke city to try and determine the offense, which is charged in the indictment to have been committed on the 27th day of January, 1884. Such question of jurisdiction may be appropriately raised by a motion for instruction, by demurrer, by motion in arrest of judgment on general issue, or by writ of error, the evidence showing that the deceased died on the 27th of January, 1884, as alleged in the indictment. Harris' Cr. Law, 305; *Phillips' Case*, 19 Gratt., 519.

Prior to the 31st of January, 1884, when the act was approved which incorporated and defined the limits of the city of Roanoke (if not up to February 25, 1884, when the act was approved, which established a corporation court for said city, and defined how far and to what extent its jurisdiction extends), [Acts 1883-4, pp. 87 and 217], the county court of Roanoke county had exclusive original jurisdiction for the trial of all offenses committed within the limits of said county (Acts 1877-8, p. 339, sec. 1), and the deceased came to his death in what was then—that is, the 27th of January, 1884—within the limits of the said county. Up to 31st January, 1884, the county court of Roanoke county certainly had exclusive jurisdiction to try the offense charged in this indictment, and that jurisdiction was not taken away from the said county court by the act incorporating the city of Roanoke, *for that act created no court.*

The act establishing the court and defining its jurisdiction was approved February 25, 1884; and in order to extend the jurisdiction of the said court to this offense, it is necessary to repeal a statute (Acts 1877-8, ch. 17, sec. 1), and take away a vested jurisdiction by mere implication; and to give the act establishing the court a retrospective operation beyond the date of its commencement, and *ex post facto* to consider an offense which was committed within the limits of Roanoke county as having been committed within the limits of the city, whose limits had not then been created or defined, when the language of the act, neither expressly nor by necessary implication, will warrant such construction. A statute will not be repealed by implication unless the latter (statute) is so inconsistent with the first that they cannot stand together. *Hogan v. Guigon, J.*, 29 Gratt., 705. In this case, construing the latter as prospective, there is perfect consistency between it and the former act. Repeal by implication is not favored by the courts; and the presumption is always against the intention to repeal, where express terms are not used, or there is no positive repugnance. *Vide Davies & Co. v. Creighton*, 33 Gratt., 688, and authorities there cited. And in *Crigler v. Alexander*, 33 Gratt., 677, the court says: "The general principle deduced from these authorities is, that no statute is to have a retrospect beyond the time of its commencement; and this principle is one of such obvious convenience and justice that it must always be adhered to, unless in cases where there is something on the face of the statute putting it beyond doubt that the legislature meant it to operate retrospectively. And although the words of the statute may be broad enough, in their literal extent, to comprehend existing cases, they must yet be construed as applicable only to cases that may *thereafter* arise, *unless* a contrary intention is unequivocally expressed therein. Dwaris' Notes, 126." But even if the act establishing the court (February 25, 1884) be given a retrospect from that date, surely its retrospection could not be held to antedate the act of January 31, 1884, which incorporated the city itself, and created and defined its limits. To give the city and its limits a locality before they were created and defined would subject offenses committed within those limits to the ordinances of the city, where they could be construed as violative of those ordinances

before their ordainment, and thus make them *ex post facto*, which is the effect which the construction operated in this case, the hustings court of Roanoke city. This conclusion disposes of this appeal, and renders it unnecessary to pass upon the numerous other errors assigned. The demurrer to the jurisdiction of the court should have been sustained, the indictment quashed, and the case dismissed from the hustings court of Roanoke city, for want of jurisdiction to hear and determine the case.

Judgment reversed.

THE PEOPLE v. SCOTT.

(56 Mich., 154.)

JURORS: *Qualification of — Knowledge of defendant.*

1. NEW TRIAL — JUROR NOT QUALIFIED — AFFIDAVITS.— Affidavits, on motion for new trial on ground that one of the jurors was not a qualified elector, held insufficient to establish such disqualification, and new trial refused.
2. KNOWLEDGE OF DISQUALIFICATION.— When a new trial is asked on the ground of the disqualification of a juror, it must appear affirmatively that the party convicted had no knowledge of the alleged disqualification until after the jury had been impaneled, when it was too late to take the objection by challenge.¹
3. QUALIFICATION OF JURORS — ELECTORS.— If his intention to become a citizen is declared in due form of law by a man of foreign birth, and the other conditions of age, and residence within the state and voting precinct for the proper length of time, are found to exist, article 7, section 1, of the Michigan constitution, confers on him the right of suffrage, and he is qualified to act as a juror, as prescribed in Howell's Statutes, section 7555.

Error to the Recorder's Court of Detroit.
Information for falsely and fraudulently altering railroad tickets. Conviction affirmed.

Moses Taggart, attorney-general, for the people.

Edward S. Grece, for respondent.

COOLEY, C. J. The respondent was convicted in the recorder's court of Detroit of a felony. After conviction he

¹ See note.

made a motion for a new trial, based upon affidavits that one of the jurors by whom he was convicted was born in Canada, and had never been naturalized. There was no showing that the fact had come to the knowledge of the respondent subsequent to the impaneling of the jury, and no reason was given for not taking the objection to the juror by way of challenge before he was sworn. The recorder assumed the truth of the fact stated in the affidavits, but held that it constituted no ground for a new trial, and proceeded to sentence. The respondent took exception to the ruling on the motion, and now brings the case here by writ of error. The respondent relies upon the statute which requires jurors to have the qualifications of electors (How. St., § 7555), and upon the case of *Hill v. People*, 16 Mich., 351, which was recognized as authority in *Johr v. People*, 26 Mich., 430, and *Bronson v. People*, 32 Mich., 34. But a very cursory examination of the statute shows that respondent fails to establish the fact that the juror did not have the qualifications of an elector. Error will not be presumed; it must be affirmatively made out; and there are in this state many electors of foreign birth who have never been naturalized. If the intention to become a citizen is declared in due form of law, and the other conditions of age, residence within the state and voting precinct for the proper length of time, are found to exist, the statute (Const. art. 7, § 1) confers the right of suffrage; and this juror, for anything shown in the case, may, therefore, be a lawful elector.

It will also appear, on reference to the case of *Hill v. People*, that this case differs from that in the fact that in that case the disqualifying circumstance did not come to the knowledge of the accused until after the jury had been impaneled, and when it was too late to take the objection by challenge. The fact was shown on the motion for a new trial, but nothing of the kind appears here. It is quite consistent with all the facts now shown that the respondent knew of the disqualification when the jury was called, and purposely reserved the objection until after he had taken the chances of an acquittal by the jury and found the result unfavorable. It is said, however, on the part of the defense, that this would be immaterial, because the accused has a constitutional right to a trial by jury, which must mean a qualified jury; and it is not compe-

tent for an accused party to waive a constitutional right in a criminal case. But the question here is not one of the waiver of rights; it is, on the other hand, a question of whether a competent tribunal has erred in dealing with rights. If a tribunal acts regularly, with competent jurisdiction of the particular case, the party is concluded; and a subsequent allegation that there has been deprivation of right is wholly inadmissible. The competent and suitable tribunal for the determination of questions concerning the qualifications of jurors is the court in which a case is brought on for trial; and in criminal cases very liberal provisions are made in behalf of accused parties to bring objections to the notice of the court by challenges. Upon these challenges, if any are made, the court must judicially pass; and, whether any are made or not, the court, in finally accepting and impaneling the jury, judicially determines that the several members are competent. The party has then had all his rights, as respects the qualifications of the jurors, preserved to him; and any allegation that any one of them is incompetent, except as it may be based on exception taken to the overruling of a challenge, is an allegation against an adjudged fact.

The notion that an accused party may at pleasure object to the want of qualification in a juror for the first time after verdict against him has no more basis in law or reason than a like claim would have if applied to the main issue on the trial. Every accused party is entitled by the constitution to a trial on the merits, and if he declines to produce his evidence when his case is brought on, he may, on motion for a new trial, allege his inability to waive a constitutional right with quite as much plausibility as this respondent does in this case. The conclusive answer would be that the case is passed to judgment; and the judgment determines that rights have been observed, and is, in fact, the conclusion of the competent tribunal in respect to them. Upon all rights claimed in the political society there must be some authority vested with powers of final judgment, and there must be rules to determine when and how the rights shall be claimed. If a party in any case fails to make his right appear until judgment has passed against him, the judgment, if regular, leaves nothing open to inquiry afterwards.

The exception in this case is without merit, and the conviction must be affirmed.

(The other justices concurred.)

NOTE.—It cannot be urged, after trial and conviction, that one of the jurors was not a freeholder or resident of the county, when his answers on examination were sufficient to suggest a probability that he was disqualified. *People v. Lange*, 56 Mich., 550.

MAYO v. STATE.

(43 Ohio St., 567.)

KIDNAPING: *The unlawful intent, etc.*

CHILD-STEALING — UNLAWFUL DETENTION — INTENT.—It is an essential element of the crime of child-stealing, under section 6825 of the Revised Statutes of Ohio, that the intent unlawfully to detain or conceal must accompany the act of taking the child.¹

Error to Court of Common Pleas, Franklin County.

Mayo was tried, convicted and sentenced to the penitentiary in the court of common pleas of Franklin county, at the April term, 1885, upon an indictment framed under section 6825 of the Revised Statutes, which defines the crime of, and prescribes the punishment for, child-stealing. This is a petition in error to reverse the judgment.

On the trial there was testimony tending to show that in December, 1884, Mayo, who lived in Delaware county, came to the city of Columbus for the purpose of drawing an instalment of pension money, payable to him by the federal government on account of disabilities incurred in the war of the rebellion. He spent several days in Columbus, stopping, as was usual with him on such occasions, at the house of his sister-in-law, Fannie Long, the prosecuting witness. It appeared that the latter's husband had, about a year previously, abandoned her, with four small children, leaving them in destitute circumstances, and dependent solely upon the labor of Fannie for support. It was Mayo's custom, when stopping with them, to expend a

¹ See note.

portion of his pension money in the purchase of provisions and clothing for the family; and upon the occasion of his visit in December, 1884, he not only purchased articles of clothing for them and gave them money, but proposed to Fannie that she should move to Delaware, where he could be near and help her. Upon her refusal, he asked permission to take some of the children with him to Delaware, and finally one of them, to keep through the winter. When he was ready to depart, he took the youngest child, eighteen months old, in his arms, and urged for permission to take it, to which he claims the mother acceded, and he thereupon left with the child; but it is claimed, upon the other hand, that he did so under the pretense of taking it out to purchase clothing for it, and that even for that purpose the mother refused to consent to its accompanying him. Upon arriving at the depot, Mayo found that the train for Delaware had gone. He then concluded to visit an uncle living in Greene county, and took another train going in that direction. On his arrival he found his uncle sick, and it became necessary that he should remain there, which he did, with the child, where it received proper attention, until the month of March following; writing several times during the winter to Fannie Long as to the whereabouts and welfare of her child, which letters, however, she claims not to have received, and that she had no knowledge of its whereabouts until March 4, 1885, when Mayo, coming to Columbus to draw his pension, was arrested. He had walked from Greene county, being out of money, and intended, after receiving his pension, to return and bring the child home. The court, among other things, charged the jury:

"If the evidence satisfies you beyond a reasonable doubt that defendant took or led or carried the said child away from the mother without her consent, and against her will, it was an unlawful taking. And if you further find from the evidence beyond a reasonable doubt that when the defendant so carried away said child he intended unlawfully to detain or conceal said Florence Long from her mother, Fannie Long, the defendant is guilty as charged in the indictment, and such should be your verdict."

And further:

"If you find from the evidence beyond a reasonable doubt

that defendant unlawfully carried the child away (and I have described to you what an unlawful taking and carrying away is), then, and in that case, *any* detention or concealment of said child by defendant (if you find that defendant did conceal and detain said child) was an unlawful detention within the meaning of the statute."

John J. Chester, for plaintiff in error.

Robert B. Montgomery, prosecuting attorney, for the state.

By THE COURT. The Revised Statutes provide:

"Sec. 6825. Whoever leads, takes, carries, decoys or entices away a child under the age of twelve years, *with intent unlawfully to detain or conceal* such child from its parent, guardian or other person having the lawful charge or custody thereof, and whoever, with the intent aforesaid, knowingly harbors or conceals any such child so led, taken, carried, decoyed or enticed away, shall be imprisoned in the penitentiary not more than twenty years nor less than one year."

The gist of the crime of child-stealing, under this section, is the "intent unlawfully to detain or conceal" the child from its parent or person entitled to its custody. But the court instructed the jury that if the child was taken away from its mother without her consent, and against her will, such taking was unlawful, and any detention thereafter completed the crime. This instruction was misleading. Plainly, the intent unlawfully to detain must be present at the time of the taking. A child might be taken from its home without the consent, and even against the will, of its parent, without intending any detention or concealment,—such as for the purpose of taking it to a place of amusement,—and under the charge *any* detention, however brief or accidental, would constitute the offense. The tendency of the charge was to lead the jury to eliminate from their minds all considerations with respect to the motive and intent of the accused at the time of the taking, and to look to the naked facts as to whether the child was taken without the consent and against the will of the mother, and was followed by *any* detention.

The crime of child-stealing is one of the most cruel and heartless in the calendar. It strikes a blow at the tenderest and most

sacred affections of the human breast, and is usually resorted to for the purposes of revenge or extortion. It is never the outgrowth of kindly and charitable feelings, such as the evidence tended to show animated Mayo in his effort to help his sister-in-law and her family in their struggle for existence. By the Jewish and the civil law, kidnaping was punishable with death, and by the common law, with fine, imprisonment and the pillory. Fortunately child-stealing is now an offense of rare occurrence; the records of this state showing but a single conviction in ten years.

Where the crime is proven in all its elements, punishment should be exemplary; but the intent unlawfully to detain or conceal is an essential element, and must accompany the act of taking.

Judgment reversed.

NOTE.—*Secret intent — False imprisonment.*—An information charging "that on a certain date, at a certain county, W. S. did feloniously, unlawfully, injuriously, wilfully and without lawful authority, forcibly confine and imprison, against his, the said A. B. E.'s, will, and him, the said A. B. E., then and there feloniously, and without any lawful authority, and against his will, forcibly did convey from a certain place in said county to H.'s store, in said county, against the peace," etc., does not charge the crime of kidnaping within Revised Statutes of Wisconsin, 1878, section 4387, but merely the common-law offense of false imprisonment, and a party found guilty under such information can only be punished by imprisonment in the county jail not more than one year, or by fine not exceeding \$250, as provided by section 4635, prescribing the punishment of a person convicted of an offense, the punishment of which is not prescribed by any statute. *Smith v. The State*, 63 Wis., 453.

(CROWN CASES RESERVED.)

THE QUEEN v. ASHWELL.

(L. R., 16 Q. B. D., 190.)

LARCENY: *Common law and statutory.*¹

LARCENY AT COMMON LAW — LARCENY AS BAILEE — TAKING INVITO DOMINO —

DELIVERY OF CHATTEL UNDER MISTAKE AS TO ITS CHARACTER — MISTAKE COMMON TO BOTH PARTIES — SUBSEQUENT FRAUDULENT APPROPRIATION. — The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. Some

¹ See note.

time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign. *Held*, that the prisoner had not been guilty of larceny as a bailee; but the court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood.

[But in *The Queen v. Flowers*, page 388 (of this volume), the old rule that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg. v. Ashwell*. That case distinguished and discussed.]

Case stated by DENMAN, J.

At the assizes for the county of Leicester in January, 1883, Thomas Ashwell was tried for larceny of a sovereign, the moneys of Edward Keogh.

Keogh and Ashwell met in a public-house on the evening of the 9th of January. At about 8 P. M. Ashwell asked Keogh to go into the yard, and when there requested Keogh to lend him a shilling, saying that he had money to draw on the morrow, and that he would then repay him. Keogh consented, and putting his hand in his pocket pulled out what he believed to be a shilling, but what was, in fact, a sovereign, and handed it to Ashwell, and went home, leaving Ashwell in the yard. About 9 the same evening Ashwell obtained change for the sovereign at another public-house.

At 5:20 the next morning Keogh went to Ashwell's house and told him he had discovered the mistake, whereupon Ashwell falsely denied having received the sovereign, and on the same evening he gave false and contradictory accounts as to where he had become possessed of the sovereign he had changed at the second public-house on the night before. But he afterwards said, "I had the sovereign, and spent half of it, and I shan't give it him back, because I only asked him to lend me a shilling."

It was submitted for the prisoner that there was no evidence of larceny, no taking, no obtaining by trick or false pretense, no evidence that the prisoner at the time he received the sovereign knew it was not a shilling.

I declined to withdraw the case from the jury, thinking it desirable that the point raised should be decided by the court of criminal appeal.

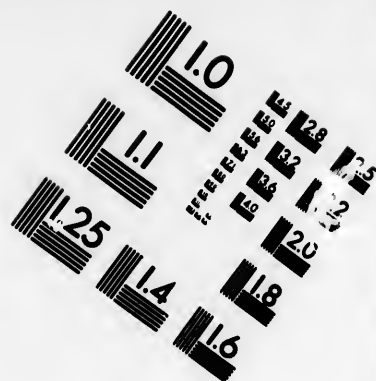
The jury found that the prisoner did not know that it was a

sovereign at the time he received it, but said they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling, and that the prisoner having, soon after he received it, discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use, and denied the receipt of it, knowing that the prosecutor had not intended to part with possession of a sovereign but only of a shilling. They added that if it were competent to them consistently with these findings and with the evidence to find the prisoner guilty they meant to do so. A verdict of guilty was entered, but the prisoner was admitted to bail, to come up for judgment at the next assizes, if this court should think that upon the above facts and findings he could properly be found guilty of larceny.

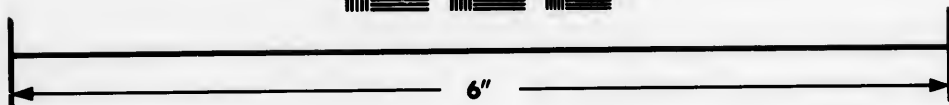
December 5th, SMITH, J., read the following judgment: The prisoner in this case was indicted for the larceny of a sovereign, the moneys of Edward Keogh.

The material facts are as follows: Keogh handed to the prisoner the sovereign in question, believing it was a shilling and not a sovereign, upon the terms that the prisoner should hand back a shilling to him when he (the prisoner) was paid his wages. At the time the sovereign was so handed to the prisoner he honestly believed it to be a shilling. Sometime afterwards the prisoner discovered that the coin he had received was a sovereign and not a shilling, and he then and there fraudulently appropriated it to his own use. Is this larceny at common law or by statute?

To constitute the crime of larceny at common law, in my judgment, there must be a taking and carrying away of a chattel against the will of the owner, and at the time of such taking there must exist a felonious intent in the mind of the taker. If one or both of the above elements be absent there cannot be larceny at common law. The taking must be under such circumstances as would sustain an action of trespass. If there be a bailment or delivery of the chattel by the owner, inasmuch as, among other reasons, trespass will not lie, it is not larceny at common law. In Hawkins' Pleas of the Crown, book 1, chapter 33, section 1, it is stated: "It is to be observed



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that all felony includes trespass; and that every indictment of larceny must have the words *felonice cepit* as well as *asportavit*; from whence it follows, that if the party be guilty of no trespass in taking the goods, he cannot be guilty of felony in carrying them away." As I understand, the counsel for the crown did not really dispute the above definition, and, indeed, if he had, upon further referring to the Third Institutes, chapter 47, page 107, and 1 Hale's Pleas of the Crown, page 61, it would be found to be fully borne out by those writers. The two cases cited in argument, *Rex v. Mucklow*, 1 Moo. C. C., 160, and *Reg. v. Davies*, Dears. C. C., 640, are good illustrations of what I have enunciated; and if other cases were wanted, there are plenty in the books to the same effect.

In the present case, it seems to me, in the first place, that the coin was not taken against the will of the owner, and if this be so, in my judgment it is sufficient to show that there was no larceny at common law; and secondly, it being conceded that there was no felonious intent in the prisoner when he received the coin, this, in my judgment, is also fatal to the act being larceny at common law.

As to this last point, the law laid down by Cockburn, C. J., Blackburn, Mellor, Lush, Grove, Denman and Archibald, JJ., in the case of *Reg. v. Middleton*, Law Rep., 2 C. C., 45, is very pertinent; it is as follows: "We admit that the case is undistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." I believe the above to be good law. The contention, however, of the crown was, that although the above might be correct, yet the present case was to be likened to those cases in which finders of a lost chattel have been held guilty of larceny. The principle upon which a finder of a lost chattel has been held guilty of larceny is, that he has taken and carried away a chattel, not believing that it had been abandoned, and at the time of such taking has had the felonious intent. The

proper direction to be given to a jury being, as I understand, "Did the prisoner at the time of finding the chattel intend to appropriate it to his own use, then believing that the true owner could be found, and that the chattel had not been abandoned?" See *Reg. v. Thurborn*, 1 Den. C. C., 387, and *Reg. v. Glyde*, Law Rep., 1 C. C., 139. If he did, he would be guilty of larceny; *aliter* he would not. Then it was argued by the counsel for the crown that the prisoner in this case was on the same footing as a finder of a chattel. In my judgment the facts do not support him.

Keogh, in the present case, intended to deliver the coin to the prisoner, and the prisoner to receive it. The chattel, namely, the coin, was delivered over to the prisoner by its owner, and the prisoner received it honestly. He always knew he had the coin in his possession after it had been delivered to him. The only thing which was subsequently found was that the coin delivered was worth 240*l.*, instead of 12*l.*, as had been supposed. This argument, as it seems to me, confounds the finding out of a mistake with the finding of a chattel. In some cases, as above pointed out, the finder of a chattel may be guilty of larceny at common law; but how does that show that the finder out of a mistake may also be guilty of such a crime? A mistake is not a chattel. The chattel (namely, the coin) in this case never was lost; then how could it be found? In my judgment the argument upon this point for the crown is wholly fallacious and fails. It was further urged for the crown that the present case was covered by authority, and the cases of *Curtwright v. Green*, 8 Ves., 405, and *Merry v. Green*, 7 M. & W., 623, were cited in this behalf. I fail to see that either case is an authority for the point insisted upon by the crown. In the first of these cases, the question arose upon demurrer to a bill in chancery as to whether a felony was disclosed upon the face of the bill. Lord Eldon, as he states in his judgment, decided the case upon the ground that, inasmuch as the bureau in question had been delivered to the defendant for no other purpose than repair, and he had broken open a part of it which it was not necessary to touch for the purpose of repair, with the intention of taking and appropriating to his own use whatever he should find therein, that this was larceny. I conceive this to be distinctly within the principle

I have above stated — there was the taking against the will of the owner with the felonious intent at the time of taking.

The other case, namely, *Merry v. Green*, 7 M. & W., 623, which was also the case of a purse in a secret drawer of a bureau which had been purchased at a sale, was clearly decided by Baron Parke, who delivered the judgment of the court, upon the principles applicable to a case of finding. The learned baron says: "It seems to us that, though there was a delivery of the secretary, and a lawful property in it thereby vested in the plaintiff, there was no delivery so as to give a lawful possession of the purse and money. The vendor had no intention to deliver it, nor the vendee to receive it; both were ignorant of its existence: and when the plaintiff discovered that there was a secret drawer containing the purse and money, it was a case of simple finding, and the law applicable to all cases of finding applies to this." I understand the learned baron, when he says "the law applicable to all cases of finding applies," to mean the law applicable to the cases of finding a chattel, for there are no cases extant as to finding out a mistake to which his remark could apply. That too is the distinction between the present case and that before Baron Parke. No intention to deliver the chattel (namely, the purse and money) *at all* ever existed, whereas in the present case there was every intention to deliver the chattel (namely, the coin), and it was delivered and honestly received.

In my judgment, a man who honestly receives a chattel by delivery thereof to him by its true owner cannot be found guilty of larceny at common law, and in my opinion the prisoner in this case is not guilty of that offense.

The second point has now to be considered, namely, was he guilty of larceny as a bailee within the true intent of section 3 of 24 and 25 Victoria, chapter 96? To constitute a person bailee of a chattel there must be a bailment and not a mere delivery of the chattel. There must be a delivery of a chattel upon contract, express or implied, to return it or obey the mandate with which the delivery is clogged, or, in other words, a delivery upon condition.

The question, as it seems to me, is this: Is the law in the present case to imply a condition, when we know perfectly well that at the time of the delivery of the coin *no condition*

at all was in the contemplation of the parties, excepting that a coin of like value should be returned to Keogh when the prisoner had drawn his wages? No condition to return the coin delivered to the prisoner was ever thought of, and in my judgment such a condition cannot be implied. Should, however, any condition be implied as to what was to be done if or when any mistake not then contemplated should be discovered, my opinion is that the only condition, if any, which could be implied would be that the prisoner would not spend or use for his own purposes 19s. out of the 20s., and I am of opinion that if the prisoner had upon the finding out the mistake taken to Keogh 19s., he would have been strictly within his rights.

The case of *Reg. v. Hussall*, L. & C., 58, is an express authority to the effect that a person is not a bailee within the statute unless he is under obligation to return the identical chattel deposited with him. In my judgment the prisoner was not a bailee of the sovereign, for the reasons above given.

I am fully alive to the remark which has been made that if the present case is not one of larceny it should be. Whether this remark is well founded or not I do not pause to inquire; but it seems to me that the observations of Bramwell, B., in *Reg. v. Middleton*, Law Rep., 2 C. C., 38, on this head, are well worthy of consideration. Believing, however, as I do, that according to the law of England, as administered from the earliest times, the present case is not a case of larceny at common law, I cannot hold otherwise than I do, and as, for the reasons given above, the prisoner is not, in my opinion, guilty of larceny as a bailee, my judgment is that the conviction should be quashed.

CAVE, J. (Read by Lord COLERIDGE, C. J.) The question we have to decide is whether, under the circumstances stated in the case, the prisoner was rightly convicted of larceny, either at common law or as a bailee.

It is undoubtedly a correct proposition that there can be no larceny at common law unless there is also a trespass, and that there can be no trespass where the prisoner has obtained lawful possession of the goods alleged to be stolen; or, in other words, the thief must take the goods into his possession with the intention of depriving the owner of them. If he has got

the goods lawfully into his possession before the intention of depriving the owner of them is formed, there is no larceny. Applying that principle to this case, if the prisoner acquired lawful possession of the sovereign when the coin was actually handed to him by the prosecutor, there is no larceny, for at that time the prisoner did not steal the coin; but if he only acquired possession when he discovered the coin to be a sovereign, then he is guilty of larceny, for at that time he knew that he had not the consent of the owner to his taking possession of the sovereign as his own, and the taking under those circumstances was a trespass.

It is contended that, as the prosecutor gave and the prisoner received the coin under the impression that it was a shilling and not a sovereign, the prosecutor never consented to part with the possession of the sovereign, and consequently there was a taking by the prisoner without his consent; but to my mind it is impossible to come to the conclusion that, at the time when the sovereign was handed to him, the prisoner, who was then under a *bona fide* mistake as to the coin, can be held to have been guilty of a trespass in taking that which the prosecutor gave him. It seems to me that it would be equally logical to say that the prisoner would have been guilty of a trespass if the prosecutor, intending to slip a shilling into the prisoner's pocket without his knowledge, had by mistake slipped a sovereign in instead of a shilling. The only point which can be made in favor of the prosecution, so far as I can see, is that the prisoner did not actually take possession until he knew what the coin was of which he was taking possession, in which case, as he then determined to deprive the prosecutor of his property, there was a taking possession simultaneously with the formation of that intention. Had the coin been a shilling, it is obvious that the prisoner would have gained the property in and the possession of the coin when it was handed to him by the prosecutor; as there was a mistake as to the identity of the coin no property passed, and the question is whether the possession passed when the coin was handed to the prisoner or when the prisoner first knew that he had got a sovereign and not a shilling.

There are four cases which it is important to consider. The first is *Curtwright v. Green*, 8 Ves., 405, which, however, differs

slightly from the present, because in that case there was no intention to give the defendant Green either the property in or the possession of the guineas, but only the possession of the bureau, the bailor being unaware of the existence of the guineas. If the bailee in that case had, before discovering the guineas in the secret drawer, negligently lost the bureau with its contents, it is difficult to see how he could have been made responsible for the loss of the guineas. In *Merry v. Green*, 7 M. & W., 623, the facts were similar to *Cartwright v. Green*, 8 Ves., 405, except that the bureau had been sold to the defendant. In that case Baron Parke says that, though there was a delivery of the bureau to the defendant, there was no delivery so as to give a lawful possession of the purse and money in the secret drawer.

If these cases are rightly decided, as I believe them to be, they establish the principle that a man has not possession of that of the existence of which he is unaware. A man cannot, without his consent, be made to incur the responsibilities towards the real owner which arise even from the simple possession of a chattel without further title, and if a chattel has, without his knowledge, been placed in his custody, his rights and liabilities as a possessor of that chattel do not arise until he is aware of the existence of the chattel and has assented to the possession of it.

A case much urged upon us on behalf of the prisoner was *Rex v. Mucklow*, 1 Moo. C. C., 160. In that case a letter containing a draft for £10 11s. 6d. had been delivered to the prisoner, although really meant for another person of the same name, and the prisoner appropriated the draft and was tried and convicted of larceny. The conviction, however, was held wrong on the ground that he had no *animus furandi* when he first received the letter. Here, as in the two previous cases, the prisoner was not at first aware of the existence of the draft, and when he became aware of it he must have known that it was not meant for him, yet the judges seem to have held that he got possession of the draft at the time when the letter was handed to him.

In *Reg. v. Davies*, Dears. C. C., 640, the facts were similar to those in the last mentioned case, and Chief Justice Erle, then Mr. Justice Erle, who tried the case, directed the jury that if,

at the time the prisoner received the order, he knew it was not his property but the property of another person of known name and address, and nevertheless determined to appropriate it wrongfully to his own use, he was guilty of larceny, and that in his opinion the prisoner had not received it until he had discovered, by opening and reading the letter, whether it belonged to him or not. "I considered," says the judge, "that the law of larceny laid down in respect of articles found was applicable to the article here in question." The court, however, quashed the conviction on the authority of *Rex v. Mucklow*, 1 Moo. C. C., 160.

In *Reg. v. Middleton*, Law Rep., 2 C. C., 38, in which it was held by eleven judges against four, that where there was a delivery of money under a mistake to the prisoner, who received it *animo furandi*, he was guilty of larceny, there occurs a passage in the judgment of some of the judges who formed the majority, which is as follows: "We admit that the case is undistinguishable from the one supposed in the argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*."

For my part I am quite unable to reconcile the cases of *Rex v. Mucklow*, 1 Moo. C. C., 160, and *Rex v. Davies*, Dears. C. C., 640, and the passage I have cited from *Reg. v. Middleton*, Law Rep., 2 C. C., 38, with those of *Cartwright v. Green*, 8 Ves., 405, and *Merry v. Green*, 7 M. & W., 623; and being compelled to choose between them, I am of opinion that the law is correctly laid down in *Merry v. Green*, 7 M. & W., 623, for the following reasons: The acceptance by the receiver of a pure benefit unmixed with responsibility may fairly be, and is in fact, presumed in law until the contrary is shown; but the acceptance of something which is of doubtful benefit should not be and is not presumed. Possession unaccompanied by ownership is of doubtful benefit; for, although certain rights are attached to the possession of a chattel, they are accompanied also by lia-

bilities towards the absolute owner which may make the possession more of a burden than a benefit. In my judgment, a man cannot be presumed to assent to the possession of a chattel; actual consent must be shown. Now a man does not consent to that of which he is wholly ignorant, and I think, therefore, it was rightly decided that the defendant in *Merry v. Green*, 7 M. & W., 623, was not in possession of the purse and money until he knew of their existence. Moreover, in order that there may be a consent, a man must be under no mistake as to that to which he consents; and I think, therefore, that Ashwell did not consent to the possession of the sovereign until he knew that it was a sovereign. Suppose that while still ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecutor for the return of 20s.? In my judgment he could not. If he had parted with it innocently while still under the impression that it was only a shilling, I think he could have been made responsible for the return of a shilling, and a shilling only, since he had consented to assume the responsibility of a possessor in respect of a shilling only. It may be said that a carrier is responsible for the safe custody of the contents of a box delivered to him to be carried, although he may be ignorant of the nature of its contents; but in that case the carrier consents to be responsible for the safe custody of the box and its contents whatever they may happen to be; and, moreover, a carrier is not responsible for the loss of valuable articles, if he has given notice that he will not be responsible for such articles unless certain conditions are complied with, and is led by the consignor to believe that the parcel given to him to carry does not contain articles of the character specified in the notice. *Batson v. Donovan*, 4 B. & A., 21. In this case Ashwell did not hold himself out as being willing to assume the responsibilities of a possessor of the coin whatever its value might be, nor can I infer that at the time of the delivery he agreed to be responsible for the safe custody and return of the sovereign. As, therefore, he did not at the time of delivery subject himself to the liabilities of the borrower of a sovereign, so, also, I think that he is not entitled to the privileges attending the lawful possession of a borrowed sovereign. When he discovered that the coin was a sovereign, he was, I think, bound to

elect, as a finder would be, whether he would assume the responsibilities of a possessor; but, at the moment when he was in a position to elect, he also determined fraudulently to convert the sovereign to his own use, and I am therefore of opinion that he falls within the principle of *Reg. v. Middleton*, Law Rep., 2 C. C., 45, and was guilty of larceny at common law.

For these reasons I am of opinion that the conviction was right.

MATTHEW, J. I concur in the judgment delivered by Mr. Justice Smith, and I desire to add the following observations in support of the conclusion at which we have arrived:

The definitions of larceny at common law which have hitherto been accepted, and which I understand are not now disputed, show that it is of the essence of the offense that there should be a felonious taking of the property of another without the consent of the owner, and that it must be an actual taking and not a conversion following upon a bailment or delivery by the owner. The taking must be a trespass. In this case, if the defendant had undertaken to get a sovereign changed for the prosecutor and to bring him back 19s., he would not, if he failed to keep his word, have been guilty of larceny at common law. This, I presume, cannot be disputed. His misconduct would have been a private injury and not a public wrong punishable as a crime. I am wholly unable to see any difference in the moral delinquency of the recipient in that case and in this; in the one case the sovereign is received upon an express promise to account for the change; in the other case it is received upon a promise to the same effect which the civil law of England implies. In neither case would possession of the coin have been obtained by a trespass. In both cases the misappropriation would follow upon a delivery by the owner of that which is said to have been feloniously taken.

But it is said, as I understand that, although the possession of the coin may, in the first instance, have been innocent, the taking occurred when it was changed, and that the felonious intention to take may be inferred from the dishonest conduct of the defendant in spending afterwards the 19s. which he ought to have returned to the prosecutor. This means that though the defendant did not take in point of fact, he ought by a fiction

to be treated as having done so in point of law, in order that he may be punished as a thief. I do not think this reasoning satisfactory. But suppose there may be a taking in some legal sense, which common sense repudiates, is there any evidence of a felonious taking? Now, suppose the sovereign had been handed in mistake to the defendant, not by way of loan or gift, but in payment of a debt of 1s., and the defendant had changed the sovereign, taken a shilling and offered the remaining change to the prosecutor, could he have been convicted for larceny of the sovereign? The answer, I presume, would be no; because his conduct would have shown that he had no felonious intention when he changed the coin. But supposing that, yielding to temptation, he had misappropriated one other shilling, and was prepared to hand back 18s., would there then have been evidence against him that he had changed the sovereign with a felonious intent? If not, at what point of misappropriation would the evidence of a felonious purpose in the original changing of the coin commence?

In my judgment, the subsequent dishonesty of the defendant is no more evidence of a felonious intent when the coin was changed in this case than it would be where the coin was received upon an express promise, which was afterwards broken, to account for the change. I think, if this conviction be affirmed, any dishonest dealing with the property of another, by whatever means possession of the property may have been acquired, may be made the ground for a prosecution for larceny.

Dishonest conduct like the defendant's ought, perhaps, to be punished; but, if it must, it should be under a statute passed for that purpose by the legislature, and not by the extension or development of the criminal law by means of judicial decision.

The highly technical reasoning upon which this conviction has been sought to be upheld should have no place, in my judgment, in the interpretation of the criminal law. Upon such a subject as theft, where the law is administered by magistrates as well as judges, it seems to me desirable that the rules by which guilt and innocence are to be determined should be susceptible of ready comprehension and easy exposition.

I think the conviction should be quashed.

STEPHEN, J. Before reading this judgment, I may observe that my brothers Day and Wills desire me to say that they agree with it.

The facts of this case are as follows: Keogh, intending to lend Ashwell a shilling, gave him a coin which he supposed to be a shilling, but which was in fact a sovereign. At the time when he received it Ashwell supposed it to be a shilling, but after about an hour he discovered that it was a sovereign, and fraudulently applied it to his own use. The question whether this was larceny was argued, first before five judges, who differed in opinion, and afterwards before fourteen.

The arguments used to show that it was not larceny were as follows: From the earliest times it has always been held that a felonious taking is essential to larceny, and that a fraudulent conversion of property after an innocent taking, though in some particular cases criminal by statute, does not amount to larceny at common law. It was further argued that there was in this case no such bailment of the sovereign as would make the prisoner guilty of larceny as a bailee under the third section of the larceny act of 1861. I think that these arguments are well founded and ought to prevail; but as a difference of opinion exists on the subject, I will give my reasons fully, noticing, as I give them, what I understand to be the arguments put forward in support of the opposite view. The history of the law relating to theft from the earliest times to the present day shows that, from the very first notices of the law of theft, it was always considered that the crime involved a taking against the will of the owner. Glanville says (book X, ch. 13) that a person who does not return what is lent (*commodatum*) to him, "a furto omnimodo excusatur, per hoc quod initium habuerit suæ detentionis per dominum illius rei." Bracton defines theft as "contrectatio rei alienæ fraudulenta, cum animo furandi, invito illo domino cujus res illa fuerit." This in itself is ambiguous, as the word "contrectatio" might refer, as it certainly did in Roman law (Digest, XLVII, tit. 2, 48, sec. 4; XLVII, tit. 2, 52, sec. 19, and XLVII, tit. 2, 54, sec. 1), to a fraudulent dealing with the thing after a delivery by the owner, but other ancient authorities make it probable that this was not Bracton's meaning. It will be sufficient for this purpose to quote two cases from the Year Books, each of which lays down the

same doctrine at a considerable interval of time. The first is in 2 Edw. III., p. 1, No. 3. A man was indicted in the sheriff's tourn because he "*felonice abduxit unum equum rubrum*." The indictment was removed to the king's bench, and it was said that it was insufficient, because it did not say that the person indicted had taken the horse feloniously (*pur ceo que il ne dit pas que vous le emblastes felonice*). This was in 1328. In 1474 (13 Edw. IV., p. 9, No. 5) was decided the famous case of the carrier who, having received goods to be carried to Southampton, carried them elsewhere, opened the bales and stole the contents. This case has been generally understood to decide that a bailee who steals the whole of the goods bailed to him commits no offense at common law; but that if he breaks bulk and steals part of them he is guilty of theft. Although this view has been generally entertained and is embodied in 20 and 21 Victoria, chapter 54, now represented by the third section of the larceny act of 1861, it is not specifically put forward as the reason of the decision in the report in the Year Books, and two judges give a different reason for their decision, namely, that the original taking was felonious, as the carrier meant not to carry the goods according to the contract, but to steal them. The case undoubtedly established the rule, whether or not it established the exception.

The case was argued twice,—first in the star chamber before the privy council, and afterwards before the judges in the exchequer chamber. The chancellor stated in the star chamber that the suit was brought by an alien merchant who had come into England with a safe-conduct, and who, he said, "is not bound to sue according to the law of the land, and to abide the trial by twelve men and other solemnities of the law of the land; but he ought to sue here, and it must be determined according to the law of nature in chancery." He added that the law merchant was "*ley universal par tout le monde*," and was the law applicable to the case, and said that a misappropriation of goods in the possession of the offender was as felonious as if they were not in his possession.

This reasoning appears to confound the criminal liability of the carrier, which must have depended on the law of England, with the civil remedy of the owner of the goods, and admits that by the law of England a felonious taking was essential to

larceny. But it must be observed that the chancellor in 1474 was Booth, then bishop of Durham, of whom Lord Campbell says: "His appointment turned out a great failure; he was equally inefficient in the court of chancery and in parliament. Except that he did not take bribes, he had every bad quality of a judge." (Campbell's *Lives of Chancellors*, 5th ed., vol. 1, p. 336.) He was, in a few months after this case, "dismissed from his office of chancellor," on account of his incompetency. When the matter was discussed in the exchequer chamber, it was held by all the judges, except Nedham, that if goods are bailed to a man he cannot take them feloniously. The judges reported to the chancellor and the council that the majority of them thought a felony had been committed. Their reasons are not given in the report.

It thus appears that, whatever may be the exact effect of the case, all the judges except one considered that a felonious taking was essential to larceny, and that if the original taking was innocent no subsequent fraudulent dealing with the thing taken would amount to larceny. If the effect of the case is that a fraudulent breaking of bulk by a carrier amounts to a felonious taking, it established at most a special, anomalous and highly technical exception to a rule which the exception itself emphatically recognizes. There are other cases on the subject in the Year Books, but it is not necessary to go through them. The rule that in every theft there must be a felonious taking, or, in other words, a trespass, and that a fraudulent conversion after an innocent taking is not theft, is laid down by every text-writer who has dealt with the subject (Coke, 3d *Institutes*, 107; Hale, 1 *Hale's Pleas of the Crown*, 504; Hawkins, book 1, chapter 19; Foster, *Criminal Law*, 123, and others, down to our time), and has been recognized by many statutes which make exceptions to it in the case of embezzlement by servants, misappropriation by agents, and especially in the case of larceny by bailees. Indeed, my only reason for going so fully into the matter is to show how characteristic and well established a part of the law the proposition in question is.

The application of this principle to the present case appears to me direct and obvious. Ashwell received the sovereign innocently, though he dealt with it fraudulently an hour afterwards, when he became aware of its value. The inference

that he committed no felony at common law appears to me to follow of necessity.

There are two ways in which it is sought to avoid this inference. It is said, first, that the delivery being made under a mistake, passed neither the property in the sovereign nor the right to a possession of it, and that the prisoner must be regarded as having taken, not when he accepted it under a mistake as to its value, but when, knowing its value, he determined to appropriate it to himself, or when he did so appropriate it by getting it changed and keeping the change. It is also said that, even if no offense at common law was committed, the prisoner was guilty of larceny as a bailee under the third section of the larceny act. I am unable to concur with either of these views.

The first view is, I think, contrary to principle, because it evades by a legal fiction the principle that a fraudulent appropriation, consequent upon an innocent taking, is not larceny. The guilt of the prisoner would follow easily and immediately from the principle that such a taking is larceny, and this second principle is in effect substituted for the first by an artificial interpretation either of the word "possession" or of the word "taking." If the word "possession" is chosen to be interpreted, this is done by explaining it to mean something beyond actual control over the thing possessed, namely, control coupled with knowledge, which may or may not exist. If the word "taking" is chosen to be interpreted, it is in this case interpreted to mean not an actual physical taking, but a subsequent change of mind relating back to such physical taking. I know of no authority for either of these fictions. The word "possession" is indeed used in many senses, some of them highly artificial, but this is a bad reason for adding a new artificial meaning to it. Its plain meaning in this case is the reception of the coin by Ashwell from Keogh. The interpretation suggested appears to me to be one against which there is express authority, which I now proceed to examine.

The cases which set the matter in the clearest light are those which relate to the finding of lost property, particularly those which have been decided in modern times. The earlier authorities laid down in general terms that to take lost goods fraudulently was not felony. Coke says (3d Institutes, 108), "If

one lose his goods and another find them, though he convert them *animo furandi* to his own use, yet it is no larceny, for the first taking is lawful." Hale (1 Pleas of the Crown, 506) says: "If A. finds the purse of B. in the highway, and takes it and carries it away, and hath all the circumstances that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony."

The generality of these expressions was long afterwards qualified by cases which decided that if the owner was known to the finder at the time when he took the goods, the offense was larceny, and various distinctions and refinements were added to this general doctrine by five modern cases. These are *Reg. v. Thurborn*, 1 Den. C. C., 387, decided in 1849; *Reg. v. Preston*, 2 Den. C. C., 353, decided in 1851; *Reg. v. Christopher*, Bell, C. C., 27, decided in 1858; *Reg. v. Moore*, L. & C., 1, decided in 1861, and *Reg. v. Glyde*, Law Rep., 1 C. C., 139, decided in 1868. These cases taken together appear to me to establish with the utmost possible clearness the proposition that, in order to justify a conviction for larceny, the original taking, in the ordinary sense of the word, must be felonious; that a fraudulent misappropriation after an innocent taking is not theft, and that a change of mind after an innocent taking does not relate back to the innocent taking and make it felonious.

In *Reg. v. Thurborn*, 1 Den. C. C., 387, the prisoner found a bank note and took it, intending to usurp the entire dominion over it, but at the time there was nothing to show him to whom the note belonged, nor had he any reason to suppose the owner knew where to find it. Next day he heard and believed that the note belonged to the prosecutor, and after this he changed it and appropriated the money to himself. It was unanimously held by seven judges that this was not larceny, though the first taking was "not innocent in one sense." The effect of the judgment is summed up at page 397, as follows: "If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny, nor would it, we think, if he had done so knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent

in one sense, and the question is, does that make a difference? We think not."

If this case is good law, and if the present case is to be decided against the prisoner, we shall have the following result: If A. finds a sovereign in the road, not knowing to whom it belongs, and appropriates it to himself after discovering the owner, he is not guilty of theft; but if A. innocently receives a sovereign from the owner, believing it to be a shilling, and appropriates it to himself after discovering its value, he is guilty of theft. This can hardly be the law.

When Ashwell received the coin and put it in his pocket, and for an hour afterwards, he did not know that Keogh was the owner of it in any sense whatever. He believed it to be his own, and that on the reasonable ground that Keogh had lent it to him, thereby passing to him an absolute property in the coin itself. When he discovered its value he had the lawful possession of it, at all events as against every one except Keogh; and if his subsequent conversion of it to his own use amounted to a felonious taking, *Reg. v. Thurborn*, 1 Den. C. C., 387, was wrongly decided.

In one or two of the latter cases some dissatisfaction has been expressed at *Reg. v. Thurborn*, 1 Den. C. C., 387 (see the observations of Martin, B., and Blackburn, J., in *Reg. v. Glyde*, Law Rep., 1 C. C., 139); but this, I apprehend, refers not to that part of the decision which held that a fraudulent conversion after an innocent taking was not larceny, but to that part which held the same as to a fraudulent conversion after a taking which was in itself not innocent. The judges, however, in *Reg. v. Glyde*, Law Rep., 1 C. C., 139, said that they were bound by *Reg. v. Thurborn*, 1 Den. C. C., 387, and it is recognized in several other cases as well.

The next case is *Reg. v. Preston*, 2 Den. C. C., 353, decided in 1851, which appears to me to affirm the doctrine as to the necessity for an unlawful taking in the first instance in the most explicit manner. In this case a 50*l.* note had been lost by Collis. It had on it the name of Collis. The prisoner, Preston, changed the note two days afterwards, having in the meantime had notice that such a note had been lost by Collis. It does not appear how Preston became possessed of the note, whether by finding or otherwise. Mr. M. D. Hill, the recorder

of Birmingham, directed the jury "that the important question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion that the prisoner either knew the owner or reasonably believed that the owner could be found at the time when he first resolved to appropriate it to his own use, that is, to exercise complete dominion over it, then he was guilty of larceny. If, on the other hand, he had formed the resolution of appropriating it to his own use before he knew the owner or had a reasonable belief that the owner could be found, then he was not guilty of larceny." This was held by the court to be a misdirection, as consistently with it the jury might have convicted the prisoner, thinking that he had taken the note innocently, and determined afterwards to misappropriate it. The judgments in this case appear to me to apply to the present case so closely that they must, if accepted as good law, be regarded as decisive of it. "Lord Campbell, C. J.: I am of opinion that this conviction cannot be supported. Larceny necessarily supposes a taking *animo furandi*. The rule as to taking is somewhat technical, but it is not likely to be departed from. In the case before us, the direction to the jury is consistent with an honest possession on the part of the prisoner. The recorder says that the question for them to consider was at what time the prisoner first resolved to appropriate the note to his own use. When, then, was the taking? It is supposed to be a thought which passed through the prisoner's own mind, but I do not think that can amount to a taking when nothing was in fact done, and when it may be that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case; consequently there is no larceny. It is unnecessary for us now to enter further into the question after the elaborate judgment of my Brother Parke on the subject of larceny in *Reg. v. Thurborn*, 1 Den. C. C., 387." "Alderson, B.: If there must be both a taking and the *animus furandi* to constitute larceny, the difficulty is, how the changing a man's mind *ex post facto* can render an honest taking larceny. According to the summing-up of the recorder to the jury, if a man gets a note honestly, keeps it for a week with an intention of restoring it to the owner, and then changes his mind and resolves to appropriate

it to his own use — it may be, as the lord chief justice remarks, while he is in bed — that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law.” “Talfourd, J.: A mere movement of the mind cannot amount in law to a taking.” “Platt, B.: The case where there has been a bailment stands on a different principle — that of breaking bulk; but to constitute larceny, in every other case, something must be taken *animo furandi* and *invito domino*.” “Martin, B.: It is of great importance that the rules of the criminal law should be plain and intelligible; and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny.” This case seems to me to be in all essential particulars identical with the present. The argument urged in support of the conviction of Preston was substantially the same as the view now under consideration. Lord Campbell states it thus (page 359): “Your position is that the finder, whilst he holds the property honestly, holds it for the right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it *animo furandi*.” This was the view from which the court dissented. The only difference between the cases lies in the fact that in *Reg. v. Preston*, 2 Den. C. C., 353, it did not appear how the prisoner got the note; whereas in the present case it appears that the prisoner got the coin from the prosecutor himself, and reasonably believed at the time that the prosecutor meant to give it to him for his own. This difference was surely in favor of Ashwell. In the one case nothing was proved as to the actual taking; in the other it was proved to have been altogether innocent. The judgments are also remarkable because they show that in the opinion of the court the felonious taking must be an actual physical taking, and that a change of mind as to the disposition of the property previously taken is not enough to constitute an unlawful taking. In 1858, *Reg. v. Christopher*, Bell, C. C., 27, was decided. It is very like *Reg. v. Preston*, 2 Den. C. C., 353. The prisoner found a purse and money, and there was evidence that he heard soon afterwards that it was cried in the street. The prisoner afterwards converted the money. It was held that on this evidence he

could not be convicted, as there was nothing to show that at the time of finding the purse the prisoner knew whose it was, or that the owner could be found, though soon after taking it he learned who the owner was.

The next case is *Reg. v. Moore, L. & C.*, 1, decided in 1861. In this case the prisoner picked up a bank-note in his shop, intending when he picked it up to take it to his own use and deprive the owner of it whoever he might be, and believing at the time when he picked up the note that the owner could be found. After picking up the note and before appropriating it, the prisoner discovered the owner. It was held that his was larceny, because when the prisoner picked up the note he had a felonious intention; and the authority of *Reg. v. Thurborn*, 1 Den. C. C., 387, was relied upon.

The last case as to finding is *Reg. v. Glyde*, Law Rep., 1 C. C., 139, decided in 1868. In this case the prisoner picked up a sovereign and determined to appropriate it, but there was no evidence to show that at the time he had reason to believe that the true owner could be found though he discovered her shortly afterwards; and this was held not to be larceny.

These cases, no doubt, differ from the present in the circumstance that in all of them the prisoner got possession of the property by finding. Their bearing upon the present case is this: They all proceed upon the principle that in all larceny the actual physical taking must be felonious; and they decide the question whether this was so in particular cases of finding, by reference to the state of the prisoner's mind at the time of finding. They will be found to establish the following proposition: If at the time of taking the lost property the finder intends to appropriate it to himself, and either knows or has the means of knowing the owner, or of knowing that he can be found, and subsequently appropriates the property, he is guilty of larceny; but if at the time of finding he either does not intend to appropriate the property, or does so intend without the knowledge or means of knowledge aforesaid, he is not guilty of larceny because his original taking is not felonious.

The question, therefore, reduces itself to this: "What difference was there between the taking by a finder and the reception by Ashwell of the coin given him by Keogh? Whatever

difference there was appears to me both in law and in common sense to be in Ashwell's favor. A finder must know that the property he finds is not his, whoever may be the owner of it. Ashwell for an hour after he received it reasonably believed that the coin which he received was his own. I cannot see how any taking can be more innocent, and to say that for the first hour his possession was Keogh's possession, and that when he determined to convert it he was guilty of a felonious taking, is expressly to contradict *Reg. v. Preston*, 2 Den. C. C., 353, and is, I think, inconsistent with the reasons for all the other decisions referred to.

There is, however, one short reason which appears to show that it is impossible to regard Ashwell's conduct as felonious at common law. It is argued that he was a bailee of the sovereign. I do not think he was; but assuming that he was, for the sake of argument, he could not be guilty at common law of larceny of the thing bailed. Assuming, then, that he was not a bailee, could he be guilty of larceny at common law? It seems to me that if a bailee who appropriated the thing bailed was not at common law guilty of larceny, Ashwell was not guilty *a fortiori*. A bailee knows what is bailed to him; he is under a direct obligation to deal with it in a particular way; he knows also who, as against him, is the owner of the goods. Ashwell took the coin under a reasonable belief that it was intended to become his own property, and that he incurred no other obligation to the man who gave it to him than that of paying back its equivalent. His taking was as innocent as a bailee's taking, and it involved no such responsibility as is incumbent on a bailee.

I may here notice one point which was raised in argument. It was said that the actual time of taking could not be the point at which the guilt or innocence of a finder must be determined, because in most cases a short time must elapse between the actual taking of a note or coin, the discovery of its nature or value, and the determination consequent upon that discovery to appropriate it; and this, it was said, shows that the time to be considered is the time of acquiring knowledge of the property taken, and not the time of taking. If a man picks up a purse containing money, some seconds must usually pass before he can open the purse and discover and de-

termine to appropriate the money. I think, however, that for legal purposes it is neither possible nor desirable to attempt to go into such a refinement as this. If a man finds a purse, picks it up, opens it, finds money in it, and thereupon determines to keep it for himself, it appears to me that the whole process ought to be regarded as one action, taking place at one time, as for many purposes the fractional parts of a day are not regarded by the law. If the examination were delayed for a substantial time, I think the question for the jury would be whether at the time of the taking the prisoner intended to keep what he had found, conditionally upon its turning out upon examination to be worth his while to do so, and whether at the time of taking the goods he had the means of knowing the owner.

Suppose, for instance, a man found a bank-note bearing the owner's name indorsed on it; suppose he put it in his pocket without examination, and ten minutes afterwards examined it, and after that kept it, it might be a fair inference that when he took it up he meant to examine it and to keep it if it was worth keeping. If by any means he could convince the jury that he took it up only to look at it, and changed his mind ten minutes afterwards, he would, I think, be entitled to be acquitted; but a jury would be likely to require strong evidence to induce them to believe in such change of mind. In the present case it is admitted that the reception of the coin was quite innocent, and that the dishonest change of mind occurred upon the discovery by Ashwell of the mistake which was common to himself and Keogh.

The case is not destitute of authority bearing directly on its peculiar circumstances. In *Reg. v. Middleton*, Law Rep., 2 C. C., 38, a depositor in a postoffice savings bank went to withdraw ten shillings from the bank. The clerk by mistake put down before him *£*10s. 10*d.*, which he, though at the time fully aware of the mistake, carried off. This was held to be larceny by eleven judges to four. The four judges who held that the case was not one of larceny did so on the ground that the taking was with the consent of the owner,—a ground which certainly covers the present case. Of the eleven judges who confirmed the conviction, seven said, "in the present case the jury have found that the prisoner had *animus furandi* at

the moment of taking the money from the counter;" and they added, "the case is undistinguishable from the one supposed in argument, of a person handing to a cabman a sovereign by mistake for a shilling; but after carefully weighing the opinions to the contrary, we are decidedly of opinion that the property in the sovereign would not vest in the cabman, and that the question whether the cabman was guilty of larceny or not would depend upon this: whether he, at the time he took the sovereign, was aware of the mistake, and had then the guilty intent, the *animus furandi*." Kelly, C. B., and Pigott, B., who delivered separate judgments, did not use this particular illustration, but their judgments proceeded on the same principle. It appears to me, therefore, that, according to the doctrine of all the fourteen judges in *Reg. v. Middleton*, Law Rep., 2 C. C., 45, the conviction in the present case cannot be sustained at common law. *Reg. v. Middleton*, Law Rep., 2 C. C., 45, appears to me a highly important case, because the judges who decided it seem to have agreed in thinking that it marked the extreme point to which the law could be carried. Lord Bramwell, the present master of the rolls, and Barons Martin and Cleasby, were of opinion that it was in that case carried too far. The majority decided on the same principle as the minority, but applied it somewhat differently.

In *Rex v. Mucklow*, 1 Moo. C. C., 160, decided in 1827, and *Reg. v. Davies*, Dears. C. C., 640, decided in 1856, it was held that it is not larceny to appropriate a security inclosed in a letter which is received by a person for whom it was not intended, but to whom it was accidentally addressed. These are stronger cases than the present one, because the sovereign was intentionally delivered to Ashwell.

The only other case to be mentioned is that of *Merry v. Green*, 7 M. & W., 623. In that case a person purchased a bureau and found in it a secret drawer containing a purse and money, which he appropriated. It was held that, unless he had notice that the bureau was sold with its contents, he was guilty of larceny. This was put upon the ground that, though there was a delivery of the bureau, there was no delivery of the notes in it; a view which hardly seems consistent with the case of *Rex v. Mucklow*, 1 Moo. C. C., 160, as it is difficult to say why the delivery of a letter should operate as a delivery

of notes inclosed in it, whereas the delivery of a bureau does not operate as delivery of its contents.

The case of *Merry v. Green*, 7 M. & W., 623, seems to suggest the possibility of a kind of double finding; for instance, a man finds a pocket-book on one day, and some days afterwards examines it and finds in it a bank-note with the owner's name. The judgment in *Merry v. Green*, 7 M. & W., 623, seems to suggest that the finding of the bank-note would take place when the pocket-book was opened, not when it was found, and that though the possession of the pocket-book might be innocent the appropriation of the note might be felonious. However this may be, it has no application to the present case. There is, however, in *Merry v. Green*, 7 M. & W., 623, a *dictum* ascribed to Baron Parke, which is referred to and explained by him in *Reg. v. Thurborn*, 1 Den. C. C., at p. 395. The result of the *dictum* and the explanation, taken together, is, I think, that if a man finds property and takes it to look at it, and afterwards finds marks on it showing who is the owner, the trespass essential to larceny is committed when he discovers the owner, and not when he takes up the property. If this *dictum* refers to a continuous act it is in agreement with the whole course of authority. If it is meant to express that when a man innocently takes found property, and afterwards discovers who is the owner, and then converts it, he is guilty of larceny, it is opposed to the cases already noticed, and especially to the judgment in *Reg. v. Thurborn*, 1 Den. C. C., 387, itself. Such as it is, this *dictum* is the only authority I have found in favor of the view under consideration.

For all these reasons, I think that in this case there was no larceny at common law, because the original taking was innocent, and with the consent of the owner, under a mistake made by himself only, and in no way produced by Ashwell.

As to the point about bailment, I agree with the judgments which have been already read, which I had not seen at the time I wrote my judgment.

I think the conviction should be quashed.

HAWKINS, J. I concur generally in the judgment of my brother Cave; and it follows that I think this conviction ought to be affirmed.

MANISTY, J. I almost feel that I may be taking up time somewhat unnecessarily after the elaborate, and, if I may say so, very able judgment pronounced by my brother Stephen; but the case is of considerable importance, and there are one or two observations which I should like to add.

It seems to me that the form of indictment is in accord with all the authorities which have been cited as to the definition of larceny, and that every one of the allegations in that indictment must be proved before the prisoner can be convicted of larceny. The form of indictment is, that the prisoner did feloniously steal, take and carry away the property in question. Now, in this case the jury have negatived the allegation that he, at the time he took it, did steal, or take it or carry it away feloniously. They have negatived that, because they find that the prisoner did not know it was a sovereign at the time he received it. It seems to me that the jury could not properly find the prisoner guilty of larceny, and that their findings amounted to a verdict of not guilty, because they find that he took it honestly, and afterwards fraudulently appropriated it.

It seems to me that it is an unfortunate thing to depart from that which has been decided solemnly to be the law, especially in a criminal case. Now the case of *Reg. v. Middleton*, Law Rep., 2 C. C., 38, unless it is overruled, covers this case, because there it was found by the jury that the prisoner took the money and went away, having, at the moment of taking it, an *animus furandi*, and knowing the money to be the money of the postmaster-general; and all the judges say that the question is, at the time when the prisoner took the money, did he take it having at that moment an *animus furandi*?

I may add this: that the real remedy — and it is a very important part of this case — the real remedy of the prosecutor was to bring an action to recover nineteen shillings out of the twenty as money had and received for his use, and to recover back the shilling which the prisoner undertook to repay the next day as money lent. The prisoner had a right to take that sovereign and change it and take a shilling out of it, and to return the nineteen shillings. It may be said that is technical; but it seems to me that, if it were necessary to decide the case

upon that point, I should be inclined to hold that the taking of it was lawful, and the possession of it was lawful.

With regard to the question of bailment, it seems to me that it required an act of parliament to make it an offense, because there was lawful possession, and subsequent fraudulent appropriation.

It seems to me, on all grounds, both on principle and authority, this conviction ought to be quashed.

FIELD, J. I am also of opinion that the conviction cannot be supported, and that, upon the evidence stated in the case, the prisoner has not been guilty of any crime punishable by law.

I have had the advantage of reading and considering the opinions and authorities relied upon, as well of my learned brethren who have preceded me in giving their judgment, as that of my lord, and my brother Cave, whose judgment my lord has already read.

I have for myself, according to the best of my ability, examined and compared the authorities and the arguments on one side and on the other, and, having done that, I have arrived at the conclusion which I have stated. I find the principles and authorities in support of that view have been stated so fully and so clearly by my learned brethren who have adopted the same view in their judgments, that I do not think it would be at all to the public advantage that I should go through the same grounds.

The prisoner has, undoubtedly, been guilty of very fraudulent conduct, and if by law he ought to be punished, I should, of course, be glad to perform my duty and affirm this conviction; but I must not, because I think he has been guilty of fraudulent conduct, make that a crime which, in my humble judgment, the law has not declared to be a crime.

Therefore, for those reasons, I think the conviction cannot be supported.

DENMAN, J. Having tried this case, I think it right to add a few words, though I might have, probably, equally done my duty by saying that I entirely concur, after full consideration,

with the judgment of my brother Cave; and I may also say that I have had the advantage of reading a judgment which has been prepared by the lord chief justice; and I believe it will be found that that is entirely in accordance with that of my brother Cave, though there are one or two observations in it which tend to fortify the conclusion at which my brother Cave has arrived. I may say that, if I thought that this case was covered by any previous decision of the court of criminal appeal, I should at once bow to authority; but I think that the judgments that have been delivered are conclusive to show that this was a case open to very considerable doubt, and it is impossible to say that any one case is so in point as to govern this case.

With reference to the findings, I think it right, inasmuch as the language was my own, to say that the questions were put with studious care to the jury, in order not to conclude the question of whether there was a felonious taking. The jury found that the prisoner did not know that it was a sovereign at the time he received it. A neutral word was expressly used to indicate only that he had it handed to him. Then the jury said that they were unanimously of opinion that the prosecutor parted with it under the mistaken belief that it was a shilling — not that he handed it over in any such sense as to make it a taking one way or the other at that time by the prisoner; that the prisoner having, soon after he received it (in the same sense), discovered that it was a sovereign, could have easily restored it to the prosecutor, but fraudulently appropriated it to his own use; and those studiously neutral words were also used in order that it might be for the court to say afterwards whether there was evidence of felonious taking at that time — at the time of the appropriation. The question, therefore, which was intended to be left for the court of criminal appeal was, whether, upon those findings upon the facts of this case, there was evidence upon which the jury might properly find the prisoner guilty of taking *animus furandi*, that is to say, of stealing that sovereign.

At the time when the case was tried, if I had been compelled then and there to give my decision, I was inclined to think that the case was covered by authority; but it was in deference to a doubt expressed by my brother Stephen in his

valuable work, in which he says it is doubtful whether it is theft fraudulently to convert property given to the person converting it, under a mistake of which that person was not aware when he received it, that I thought it right to reserve a case.

Now I wish, very shortly, to state the ground upon which I think that this was larceny. I quite agree in the definition of larceny — in fact I do not know that there is any dispute about it. The question is whether the person charged has feloniously stolen, taken and carried away property, and in this particular case the question turns upon whether there was a felonious taking.

It has been put in this way — that here there was a fraudulent appropriation after an innocent taking. That seems to me to be not the true test to apply in this case, on this ground, that at the time at which the sovereign was mistakenly handed over by the prosecutor to the prisoner it was impossible that the question of *animus furandi* could be raised, for the simple reason that the prosecutor never intended to part with a sovereign; nor did the prisoner ever believe that he was receiving a sovereign. I think a great deal of the difficulty of this case has arisen from applying the ambiguous word “take” to the receipt of a thing handed over by mistake. At the time of the handing over there was nothing to make the prisoner know that he had got a sovereign. He assumed that it was a shilling. That being the state of things, I have come to the conclusion that the case falls within the authority of those cases in which it has been held that where a man finds property, and at the time at which he finds it has the full means of knowing whose it is, with full power at once to disgorge it, and perfect knowledge that it was not intended for him, and then fraudulently appropriates it, there is larceny, and the taking is at the time of fraudulently appropriating it.

I see no stretching of the law in applying the same principle here which was applied in *Reg. v. Thurborn*, 1 Den. C. C., 387, and that being so, I think the conviction can be supported.

Lord COLERIDGE, C. J., read the following judgment:

I have had the advantage of reading the judgment prepared in this case by my brother Cave, and in so much of his judg-

ment as relates to the question of larceny at common law I entirely concur. I think it very doubtful, indeed, if this conviction could be supported on the ground that there was any bailment of the sovereign to the prisoner. I much doubt if there was in this case any bailment at all. I was one of a considerable minority of judges on the second argument of *Reg. v. Macdonald*, 15 Q. B. D., 323, and my opinion was, and is, that bailment is not a mere delivery on a contract, but is a contract itself. Sir William Jones speaks of it as that *contract* which the lawyers call bailment. Sir William Jones on Bailment, p. 1. "Bailment, or delivery of goods to another person for a particular use," says Sir William Blackstone. 2 Bla. Com., p. 396. "Bailment is a compendious expression to signify a contract resulting from delivery." Story on Bailments, p. 1. Twice over in Story on Contracts, sections 680, 681, the author speaks of bailment as itself a contract. "Depositum (that is, bailment) is a contract," says Grotius in his introduction to Roman-Dutch law. Depositum, sec. 2. "The contract of bailment" is not a mere loose and common phrase, but is the accurate expression of a legal idea; and I must confess it appears to me it would be doing some violence to the plain facts of this case to hold that there was any implied contract (there certainly was no express contract) of bailment between the prisoner and Keogh.

On the question as to larceny at common law I desire to add only a few words, and to call attention to a case to which my attention has been called by a gentleman at the bar, which was not mentioned in the argument; possibly because it was one which did not exactly suit the views of either party to that argument. I assume it to be now established law that where there has been no trespass, there can at common law be no larceny. I assume it also to be settled law that where there has been a delivery—in the sense in which I will explain in a moment—of a chattel from one person to another, subsequent misappropriation of that chattel by the person to whom it has been delivered will not make him guilty of larceny, except by statute, with which I am not now concerned. But then it seems to me very plain that delivery and receipt are acts into which mental intention enters, and that there is not in law any more than in sense a delivery and receipt, un-

less the giver and receiver intend to give and to receive respectively, what is respectively given and received. It is intelligent delivery, as I think, which the law speaks of, not a mere physical act from which intelligence and even consciousness are absent. I hope it is not laying down anything too broad or loose if I say that all acts, to carry legal consequences, must be acts of the mind; and to hold the contrary, to hold that a man did what in sense and reason he certainly did not; that a man did in law what he did not know he was doing and did not intend to do—to hold this is to expose the law to very just but wholly unnecessary ridicule and scorn. I agree with my brother Stephen that fictions are objectionable, and I desire not to add to them; but it seems to me, with diffidence, that he creates the fiction who holds that a man does what he does not know he does and does not mean to do, not he who says that an act done by an intelligent being for which he is to be responsible is not an act of that being unless it is an act of his intelligence. If it had been so decided by authority which binds me, of course I should submit; but if it has not been so decided, I take the freedom to say that it is not law—at least yet. In this case, therefore, it seems to me there was no delivery of the sovereign to the prisoner by Keogh, because there was no intention to deliver, and no knowledge that it had been delivered.

Applying the same principles of reasoning, it appears to me that the sovereign was received by the prisoner and misappropriated by him at one and the same instant of time. In good sense, it seems to me he did not take it till he knew what he had got; and when he knew what he had got, that same instant he stole it. According to all the cases, if at the very moment of the receipt of a chattel the receiver intends to misappropriate and does misappropriate it, he is guilty of larceny. I think, for the reasons I have given and in the sense I have defined, the prisoner did so here; and this seems to me, with great deference to my brother Smith, to be the answer to the exceedingly able and ingenious passage in his judgment in which he says that it is a fallacy to confound two things so utterly different as the discovery of a mistake and the stealing of a chattel. I do not shrink from the conclusion, which seems to me good sense, that sometimes the discovery of a mistake

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and the stealing of a chattel may be the same, or rather may be two forms of words equally descriptive of the same facts, if, as here, the chattel is really discovered and stolen at one and the same instant of time.

This would be my view if the case were bare of authority and the matter were *res integra*. But it is not *res integra* and there is abundant authority. On this part of the case I concur with my brother Cave. I think we cannot reverse this conviction without practically overruling Lord Eldon in *Cartwright v. Green*, 8 Ves., 405; the court of exchequer in *Merry v. Green*, 7 M. & W., 623, and the *dicta* cited by my brother Cave from the judgment of the majority of the judges in *Reg. v. Middleton*, Law Rep., 2 C. C., 38. I can see no sensible or intelligible distinction between the delivery of a bureau not known to contain a sum of money or a purse, and the delivery of a piece of metal not known to contain in it 20s.; and the passage in the judgment of Sir A. Cockburn, which was assented to by the majority of the judges in *Reg. v. Middleton*, Law Rep., 2 C. C., 38, appears to me, as it does to my brother Cave, to be decisive of this case.

It remains only for me to call attention to *Reg. v. Riley*, Dears. C. C., 149, the case which I mentioned at the beginning of my judgment. In that case a man had, without intending it, and innocently, driven off a lamb belonging to another man with a flock belonging to himself. Some time afterwards he discovered the mistake and sold his own flock and the lamb that was not his own to a purchaser. It was held that he was guilty of larceny of the lamb. The case was tried in 1852, when the law of the replication *de injuria*, decided in *Crogate's Case*, 8 Rep., 66b, and the distinction between case and trespass, decided in *Scott v. Shepherd*, 2 Wm. Bl., 892, still commanded the assent, indeed the veneration, of Westminster Hall. And the ground on which the conviction was supported was that there had been a trespass in driving off the lamb, however innocently; that by the sale the trespass became felonious, and I suppose felonious *ab initio*, to bring it within the definitions given in *Reg. v. Thurborn*, 1 Den. C. C., 387. The court there upheld the conviction on a ground extremely technical. If the owner of the lamb had been present when it was driven off, and believed it to be one of the prisoner's flock,

according to the present argument the conviction in *Reg. v. Riley*, Dears. C. C., 149, must have been quashed. I cannot think it would have made any difference, and the case as it stands is an authority under circumstances hardly different from those in the present case for upholding this conviction. I am therefore of opinion that the conviction was right.

In the judgment I have pronounced I am desired to say that my learned brothers Grove, Pollock and Huddleston concur. There are, therefore, seven for affirming the conviction and seven for quashing the conviction, and, by the well-known rule of this court, *presumitur pro negante*, the conviction stands.

Conviction affirmed.

NOTE.—See *Johnson v. The People*, 5 Am. Cr. Rep., 350, in which the meaning of the words "possession and custody" are discussed at great length, and in which it is affirmed "that as a bailee is one who has the possession and a qualified property in the goods or other property, under a contract with the owner, either express or implied, he cannot commit a larceny of the bailment so long as the contract under which he holds the same is subsisting; but when the contract by any means terminates, he ceases to be a bailee and the possession reverts to the owner, although the bare custody still remain with the bailee. By the very terms of the statute a bailee in possession alone can commit the statutory offense, for there can be no such thing as a bailee out of possession."

(CROWN CASES RESERVED.)

THE QUEEN v. FLOWERS.

(L. R., 16 Q. B. D., 643.)

CRIMINAL LAW: *Larceny* — *Delivery of chattel under mistake common to both parties* — *Innocent receipt by prisoner* — *Subsequent fraudulent misappropriation.*

The old rule of law that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg. v. Ashwell*, *ante*. That case distinguished and dismissed.

Case stated by the recorder of Leicester, of which the facts were in substance as follows:

The prisoner, Charles Flowers, was indicted at the Epiphany sessions for the borough of Leicester for the larceny, as a servant, of 7s. 11½d., the property of Samuel Lennard and another,

his masters; other counts charged him with simple larceny, and with receiving. He was at the time of the offense charged a clicker in the service of the prosecutors, a firm of shoe manufacturers in Leicester, and the usage with respect to the payment of wages in their establishment was as follows:

The amount of wages due to each workman was calculated from the time book and entered in the wages book. Each amount was then made up and put into a small paper bag, which was then sealed, and the bags so secured were sent to the various rooms in which the men worked. The foreman of each of such rooms then distributed the bags containing the wages among the men under his charge. When a mistake occurred the workman affected thereby took his bag to Francis Cufflin (the clerk) to have the mistake rectified.

From the evidence given by the witnesses for the prosecution, it appeared that on the 31st of October, 1885, the sum of 16s. 8d. was due to the prisoner for wages; a bag, which was supposed to contain that sum, was handed by the foreman of the room to the prisoner, who tore the top off the bag, and in the presence and hearing of Hillman, a fellow-workman, put the money in his pocket, remarking that he was short but would keep what he had got. On the same day, after the men had been paid, the prisoner came to Cufflin, the clerk, and handed him the torn bag, saying that he was 3d. short; the bag was then empty.

At the same time that the prisoner was making his complaint to Cufflin, another clicker, named Jinks, also made a complaint that his amount was 5d. or 6d. short; the sealed bag of money which had been handed to Jinks for his wages was marked on the outside, "7s. 11½d., Jinks," and he, knowing that this was less than the wages properly due to him, handed his bag to Cufflin unopened, in the same condition as that in which he had received it from the foreman; the prisoner was present when he so handed it back. Cufflin obtained from the cashier the 3d., by which the prisoner's wages were short, and handed that sum in coppers to the prisoner, together with a bag which Cufflin believed to be the prisoner's bag, but which was, in fact, the unopened bag containing Jinks' wages. The prisoner, having received the 3d. and Jinks' bag, containing the 7s. 11½d., immediately went away.

The witness Hillman said that he was present when Cufflin gave a bag and three coppers to the prisoner, and was with the prisoner when he came out with the bag and three coppers; that the prisoner emptied some money out of a paper bag into his hand, and that the money consisted of silver and copper coins, including three or four large silver coins; that the prisoner said, "the biter has got bit," and added, "he has paid me double wages;" and that, after showing the money to the witness, the prisoner turned round to another man and said, "come on, we'll go and have a drink on it." (It did not appear from the case how long a time elapsed between the receipt of the money by the prisoner, and its subsequent fraudulent appropriation by him; but the inference from the evidence of Hillman would seem to be that it was very short.)

At the close of the case for the prosecution the counsel for the prisoner submitted that there was no case to go to the jury, contending that the evidence failed to show that the prisoner, at the time he received the 7s. 11½*d.* from Cufflin, had the *animus furandi* essential to constitute the offense of larceny, and that any subsequent fraudulent appropriation of the money by the prisoner was immaterial in so far as the offense of larceny was concerned.

The recorder ruled that there was evidence to go to the jury of the prisoner having the *animus furandi* at the time he received from Cufflin the 7s. 11½*d.*, and also ruled, in deference to the opinion of some of the judges in *Reg. v. Ashwell*, ante, that if the prisoner received the 7s. 11½*d.* innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny.

In answer to two questions put to them by the recorder, the jury found that the prisoner did not know that the bag containing the 7s. 11½*d.* did not belong to him at the time he received it from Cufflin, but that, having received the bag and its contents innocently, he afterwards fraudulently appropriated them to his own use; upon which findings the recorder directed a verdict of guilty to be entered on the first count of the indictment.

The question for the court was whether, the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money from Cufflin, he could be

rightly convicted of larceny by reason of the subsequent fraudulent appropriation by him of the money to his own use. The prisoner was admitted to bail, to come up for judgment at the next sessions.

No counsel appeared.

LORD COLERIDGE, C. J. This is a case which might have raised a difficult and subtle question, but from the mode in which it has been stated by the learned recorder there appears to be a clear distinction between it and *Reg. v. Ashwell, ante*. In that case the judges who were in favor of upholding the conviction did not intend to question the ancient doctrine that an innocent receipt of a chattel and its subsequent fraudulent appropriation do not constitute larceny. On the contrary, it will be seen from the judgment of one of the judges in that case that he expressly accepts that rule of law. In the present case the learned recorder directed the jury that if the prisoner innocently received the money and afterwards fraudulently appropriated it, he was guilty of larceny. It was not our intention in *Reg. v. Ashwell, ante*, to enunciate any such rule, and the law has been incorrectly laid down to the jury by the learned recorder; they may have thought, consistently with his direction, that a fraudulent appropriation six months after the original receipt would be sufficient to warrant them in convicting the prisoner of larceny. We are asked to say whether the jury were wrongly directed, and we are of opinion that they were. If the judgments of the seven judges who affirmed the conviction in *Reg. v. Ashwell, ante*, are carefully read, it will be seen that there is a most substantial difference between that case and the present, and that those judges were of opinion that to justify a conviction for larceny the receipt and appropriation must be contemporaneous.

MANISTY, J. I am of the same opinion, and am glad that the opportunity has occurred for stating the substance of the decision in *Reg. v. Ashwell, ante*. The difference of opinion amongst the judges in that case was founded on the facts of the case and on the application to those facts of the settled principle of law, that innocent receipt of a chattel coupled with its subsequent fraudulent appropriation does not amount

to larceny. Some of the judges thought that the facts of that case did not show an innocent reception of the sovereign, and said that it was larceny; others thought that the reception was innocent, and held that it was not larceny. I am glad to think that the old rule of law still exists in its entirety.

HAWKINS, J. The old rule of law was never really questioned by any of the judges in *Reg. v. Ashwell*, ante. This case is altogether different; the recorder told the jury that if the prisoner received the 7s. 11½d. innocently, and afterwards appropriated it to his own use, he was guilty of larceny. It is perfectly clear to my mind that it could not be so. The summing-up here shows that the learned recorder was under a misapprehension as to the rule of law.

DAY, J. As one of the judges who dissented from the conviction in *Reg. v. Ashwell*, ante, I only say that I think that this conviction cannot be supported.

GRANTHAM, J., concurred.

Conviction quashed.

ROBERTS V. THE STATE.

(21 Tex. Ct. App., 460.)

LARCENY: *Animus furandi*.

A conviction for theft cannot be sustained unless the *animus furandi* is shown to have existed at the time of the taking.

Appeal from an order of the District Court of Falls County, overruling motion for new trial on the ground of the insufficiency of the evidence.

Martin & Dickinson, for appellant.

J. H. Burts, assistant attorney-general, for the state.

WHITE, P. J. The appellant in this case is charged, by bill of indictment, with the theft of a watch-chain from the person of W. H. Feagle. The only error complained of is the court's refusal to grant a new trial, the motion for which is based upon

the insufficiency of the evidence to support the finding of the jury, and the judgment of the court thereon. There was no question made as to the property alleged to have been taken having passed from the manual possession of Feagle to that of the appellant, or as to the manual act by which the change was effected. The only question raised upon the facts is this: Was there in the mind of the appellant, at the time the change of manual possession was effected, an intention to deprive the owner of the value of the chain, and to appropriate it to the use or benefit of the appellant? Otherwise stated: Did the *animus furandi* exist at the time of the taking?

We think not, and for the reasons following: It appears from the evidence that the appellant and the prosecuting witness, Feagle, had an altercation, growing out of a proposed sale of some cotton-seed by the former to the latter; that in its progress appellant struck Feagle a blow of the hand, about that portion of the breast to which the chain was attached; that Feagle then stooped to get a stick, and while he was in this stooping posture, appellant ran away in the darkness, toward the business portion of the town of Marlin, in which town the altercation occurred. It further appears that Feagle was not apprised of his loss until a short time afterwards, when he had gone to the light; that shortly after the difficulty appellant visited the saloon of one Rinkelman; detailed the particulars, at the same time exhibiting the chain, and stated that he had got it from Mr. Feagle in the "scrimmage." Appellant was shortly thereafter arrested by the city marshal, the chain being found by Rinkelman on a box in the front part of the saloon, whether before or after appellant's arrest was left in some doubt by the testimony.

Applying these facts to the solution of the question propounded, the court is constrained to say that they are insufficient to support the verdict. *First* of all, it is to be observed that there are none of the usual marks of premeditated design surrounding the taking, it having occurred while the appellant was being ejected from the premises of the prosecuting witness; *second*, that the change of possession was effected by the second of two blows stricken at Feagle by appellant; *third*, that no presumption of guilty intent can fairly be drawn from the appellant's fleeing, the attempt of Feagle to secure a stick

being an already sufficient motive to prompt flight; and *fourth* and lastly, that appellant's subsequent exhibition of the chain and accounting for its possession, and afterwards *leaving* it exposed to the public view, is entirely inconsistent with the guilty intent of appropriation.

The charge of the learned judge who presided is a lucid and able exposition of the law as applicable to the questions raised by the facts, but, because of the court's error in overruling a motion for the new trial, the judgment must be reversed and the cause remanded.

RIGGS v. THE STATE.

(104 Ind., 261.)

LARCENY: *Constitutionality of statute — Evidence.*

1. INDICTMENT — DESCRIPTION OF STOLEN PROPERTY.— Where the property stolen is coin or bank-notes current as money, it is sufficient, under section 1750 of Revised Statutes (Indiana), to describe the coin or bank-notes generally, without stating the denomination or the kind of bills or coin.
2. CONSTITUTIONALITY OF STATUTE.— While a statute cannot dispense with a statement in the indictment of the essential ingredients of the crime charged against an accused person, it may provide that the description of the property stolen may be general.
3. EVIDENCE.— It is not essential to a conviction of the offense of larceny that the bank-notes stolen should be particularly identified or described.

From the Fayette Circuit Court.

B. F. Claypool and *J. H. Claypool*, for appellant.

F. T. Hord, attorney-general, *L. M. Develin*, *R. Conner* and *H. L. Frost*, for the state.

ELLIOTT, J. The property which the appellant is charged to have stolen is thus described:

"Five hundred and twenty dollars of the paper currency, money and bank-notes current in the United States; a more particular description of which currency, money and bank-notes affiant cannot give; said \$520 being then and there the

personal property of this affiant, Samuel Lamberson, and then and there of the value of \$520."

The description of the money alleged to have been stolen is sufficient, under the provisions of section 1750 of our statute. It is true that the exact words of the statute are not employed, but it is affirmed, by a long line of decisions, that it is not necessary to use the words of the statute, provided words of equivalent meaning are used. *State v. Miller*, 98 Ind., 70; *Toops v. State*, 92 Ind., 13; *Howard v. State*, 87 Ind., 68; *State v. Allisbach*, 69 Ind., 50; *Shinn v. State*, 68 Ind., 423; *Stuckmyer v. State*, 29 Ind., 20; *Malone v. State*, 14 Ind., 219; *Marble v. State*, 13 Ind., 362; *Pelts v. State*, 3 Blackf., 28; *State v. Bougher*, 3 Blackf., 307.

As the language employed in the affidavit and information is equivalent in meaning to that which the statute declares shall be sufficient, the ruling of the trial court denying the motion to quash must be sustained, unless the statute is unconstitutional. It is affirmed that it is so, because in conflict with the provision of the constitution that "the accused shall have a right to demand the nature and cause of the accusation against him, and to have a copy thereof." We have no doubt that a statute attempting to deny an accused the right to demand the nature of the charge preferred against him would be void. It is not in the power of the legislature to deprive one accused of crime of the right to demand information of the nature of the crime which he is charged with having committed. *Miller v. State*, 79 Ind., 198; *Landringham v. State*, 49 Ind., 186; *McLaughlin v. State*, 45 Ind., 338; *State v. O'Flaherty*, 7 Nev., 153. We agree with Mr. Bishop that "the nature and cause of accusation are not stated where there is no mention of the full act or series of acts for which the punishment is to be inflicted." 1 Bish. Crim. Proc., § 88. This rule requires that the indictment or information shall contain the essential elements of the crime charged, although, as said in *State v. O'Flaherty*, *supra*, "the power of the legislature to mold and fashion the form of an indictment is plenary."

If the statute under examination can be regarded as depriving an accused of the right "to demand the nature of the accusation against him" it must fall. The question is: Does it

deprive an accused of that right? Our judgment is that it does not. It does not dispense with a statement of any of the essential ingredients of a criminal offense, but merely prescribes a rule for the description of bank-notes or coin current as money when the property stolen is of that class. It does not profess to dispense with all description of the property stolen, but simply declares what description shall be specific. It does not attempt to dispense with the description of the class or kind of property; but merely provides that "it shall be sufficient to describe such money, bills, notes or currency simply as money, without specifying any particular coin, note, bill or currency." The statute is confined solely to the matter of description, and provides the method of describing a particular kind or class of property. The description of the class or kind of property, accompanied by a statement of all the essential ingredients of the crime, is sufficient to inform the accused of the nature and cause of the accusation against him. The constitution does not require that an accused shall have a right to a specific statement of the charge against him, but the requirement is that he shall be informed of the nature of the charge. There is a material difference between a provision dispensing with a description of the stolen property entirely, and one prescribing the degree of particularity to be observed in giving the description; for the nature of an offense may not be stated where there is no description at all, but may be stated by a description of the class or kind of property, although it is not specifically described. It has always been held that where a person from whom property has been stolen is unable to describe it, the indictment will be sufficient if it alleges an excuse for not giving a particular description. 2 Bish. Crim. Proc., § 705. Any other rule would often permit the thief to go unpunished. As was said by us in *McQueen v. State*, 82 Ind., 72:

"It would be unreasonable to expect one who is robbed of money or its representative to give an accurate description of it, and it would render it almost impossible to convict a thief or a robber if courts should undertake to require the prosecutor, in all cases, to give a particular description of the money or note feloniously taken. The failure to give an exact description can never endanger the liberty of an innocent man,

but the enforcement of such a rule as that for which counsel contend would furnish the guilty with ready and easy means of escape."

We refer to these authorities for the purpose of showing that it has ever been the law that particularity of description may be dispensed with, and that there is a material difference between such matters and the essential elements of a criminal offense. If a grand jury or a prosecuting attorney may dispense with particularity of description, certainly the supreme legislative power of the commonwealth may do so.

It is only where a statute is clearly unconstitutional that it will be overthrown by the courts, and the one before us certainly cannot be regarded as so clearly in conflict with the constitution as to warrant us in declaring it void. *Robinson v. Schenk*, 102 Ind., 307. So far are we from regarding the statute under consideration as clearly unconstitutional, that we are well satisfied that it is plain that it is not in conflict with the constitution.

We cannot reverse the judgment upon the ground that the money stolen from Lamberson was not particularly identified. It would be unreasonable to require a man who has lost a large sum of money to particularly describe the various notes and bills. All that can be done, and all that need be done in such a case, is to give the best description attainable, and show an excuse for not doing more. The statute to which we have referred declares this rule, and, in doing this, does little more than express the rule of the common law.

Judgment affirmed.

STATE v. GERRISH.

(78 Me., 20.)

LARCENY: Indictment for concealing stolen goods — Arrest of judgment — Proof of value.

1. **INDICTMENT FOR CONCEALING STOLEN GOODS.**— An indictment for concealing stolen goods is sustainable, notwithstanding the fact that the articles charged therein to have been concealed are collectively instead of separately valued.

2. ARREST OF JUDGMENT.— Under such an indictment, the fact that some of the goods were not stolen cannot, after an unqualified verdict of guilty, be taken advantage of by motion in arrest of judgment.
3. SEPARATE PROOFS OF VALUE.— It is not necessary that separate proof of the value of the goods stolen be adduced at the trial under such indictment, but such value may be inferred by the jury from inspection of the goods, or from the description by witnesses.

This was an indictment for concealing stolen goods. The jury returned a general verdict of guilty, and the respondent filed a motion in arrest of judgment. The presiding judge overruled the motion, and the respondent excepted.

Frank M. Higgins, county attorney, for the state.
Copeland & Edgerly, for the defendant.

PETERS, C. J. The indictment charges the concealing of stolen goods, described in this manner: "One box containing about twenty pounds of tobacco; one chest of tea; thirty pairs of shoes; and ten pairs of boots,—all of great value, to wit, of the value of \$75." Several matters are presented, under the motion in arrest, which we cannot consider, because they arise outside of the indictment. The only point presented under the motion that may be seen upon the indictment itself is that the goods are collectively instead of separately valued. But this does not render the indictment void. It may have made it difficult to maintain. The point relied on by the defense is that, inasmuch as all the alleged goods were not stolen and concealed, the entire value of the property may have attached to the goods which were not stolen, the others being valueless. But the indictment itself discloses no such weakness. The presumption arising from a general and unqualified verdict is that all the goods were stolen and secreted. The verdict saves the indictment, rendering the whole record good. *State v. Hood*, 51 Me., 363; *Com. v. Lavery*, 101 Mass., 207; 2 Bish. Proc. (3d ed.), § 714.

The counsel for the respondent asserts that, as a matter of fact, all the articles were not stolen, and produces a copy of the evidence for our examination that we may see that they were not. But that is a matter of proof and not of pleading. To meet any defect of proof the remedy would have been to request rulings appropriate to the facts, if not given without

request. Or a motion to set the verdict aside, as being against the proof, would have reached the alleged difficulty. The point is presented to us only upon exceptions to a refusal to sustain a motion in arrest.

In the bill of exceptions a point is made upon the ruling of the judge in another question. It is inferable from the exceptions that there was no evidence introduced to show what the goods, or any of them, were worth, or whether worth anything or not. That is, no witness testified specifically upon the question of value. The judge was requested to tell the jury that the prosecution must prove that the articles named in the indictment were of value and that the fact should be proved by evidence, and was not to be merely inferred. The jury were instructed that the fact of value must be proved by evidence, but that they might infer from all of the evidence in the case whether the articles were of some value or not. This was correct. It was not required that the fact of value should be established by any separate proof. The jury may infer it from an inspection of the articles, or from having heard them described by witnesses. The jury need not necessarily be informed of what they can see for themselves. Many things speak their own value. *Res ipsa loquitur*. Suppose the stolen goods had been government gold pieces, would it have occurred to any one that a witness should be called to swear that they were valuable? Bish. Crim. Proc., § 751, and cases; *Com. v. Burke*, 12 Allen, 182; *Com. v. McKenney*, 9 Gray, 114; *Com. v. Lawless*, 103 Mass., 431.

Exceptions overruled.

WALTON, VIRGIN, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

PEOPLE v. PRICE.

(67 Cal., 350.)

LARCENY: Jury — Instructions — Setting aside verdict — Degree of crime.

1. JURY — INSTRUCTIONS — SETTING ASIDE VERDICT. — An objection that instructions were so given, and the circumstances, by reason of noise, such that the jury did not hear the instructions, must be made at the

trial, and the court should be requested to repeat the instructions in such manner and at such time that they could be heard by the jury; and if the case is allowed to go to the jury under such circumstances without objection, the verdict will not be set aside.

2. VERDICT—DEGREE OF CRIME.—As there is only one degree of grand larceny, a verdict finding a person, who is charged with the crime of "grand larceny," "guilty as charged," will be sufficient under the statute, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

Appeal from a judgment of the Superior Court of the County of San Joaquin, and from an order refusing a new trial.

J. H. & J. E. Budd, for appellant.

Attorney-General Marshall, for respondent.

MORRISON, C. J. The defendant was informed against in the superior court of San Joaquin county for the crime of grand larceny, committed by feloniously stealing from the person of another the sum of \$11. and on the trial the jury rendered the following verdict: "We, the jury in the above entitled cause, find the defendant guilty, and recommend him to the mercy of the court." A motion for a new trial was made in the case, which was denied by the court, and the appeal is prosecuted from the judgment, as well as the order denying the motion for a new trial.

There are two points made in the appeal, the first of which is that the jury did not hear the instructions given by the court. There is no evidence that the instructions were not heard by the jury, excepting the affidavit of the attorney that *he* did not hear them; and therefore it by no means satisfactorily appears that the point is well taken in fact. But, conceding that it is, it furnishes no reason in law for our interfering with the judgment. If it be true, as a matter of fact, that the jury did not hear the instructions of the court, because, as stated, there was so much noise in the court-room at the time, the court should have been requested to repeat the instructions in such a manner, and at such a time, that they could have been heard by the jury. It would be unfair to the prosecution to allow the case to go to the jury under such circumstances, and then set aside the verdict, if adverse to the defendant, for any such reason.

The other point is that the verdict is a nullity, inasmuch as it does not conform to section 1157 of the Penal Code, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty."

The only question in the case is whether the crime with which the defendant was charged, and of which he was convicted, is distinguished into degrees. If it is, the verdict of the jury is clearly imperfect and bad under the foregoing section of the Penal Code. By section 486 of the Penal Code larceny is divided into two degrees, the first of which is termed "grand larceny," the second "petit larceny;" and by section 487 grand larceny is committed in either of the following cases:

- "(1) When the property taken is of a value exceeding \$50.
 - (2) When the property is taken from the person of another.
 - (3) When the property taken is a horse, mare, gelding, cow, steer, bull, calf, mule, jack, goat, sheep or hog." Sec. 488.
- "Larceny in other cases is petit larceny."

In the case we are now considering the defendant was charged with the crime of grand larceny, inasmuch as he was accused of stealing money from the person of another. It will be observed that the defendant was charged in the information with the crime of grand larceny, and it was further charged that the stolen goods were taken from the person of another. Now there is, under the law, but one degree of grand larceny,—whether the property stolen is of the value of \$50 or \$50,000,—and every larceny committed by taking from the person of another is, in its degree, grand larceny. So that, in either aspect of the case, the charge against the defendant was the crime of grand larceny, which, as already remarked, is without degrees, and the verdict of the jury finding the defendant guilty was, guilty as charged; that is to say, guilty of grand larceny. In the case of *The People v. Whitely*, 64 Cal., 211, in which the defendant was charged with the crime of grand larceny, the verdict was, "guilty as charged," and it was held sufficient. In our opinion the same rule is justly applicable to the case now before us. There is nothing doubtful or uncertain in the verdict.

Judgment and order affirmed.

ROSS, J., MCKINSTRY, J., MCKEE, J., THORNTON, J., and MYRICK, J., concurred.

STATE V. HALE.

(12 Or., 352.)

LARCENY: *Stolen property — Evidence — Possession — Presumption.*

The possession, shortly after the theft, of the property stolen is a fact to be submitted to the jury, but it does not raise, as to the party so possessing, the presumption of guilt.¹

Appeal from Umatilla County.

Wm. Ramsey, for appellant.

Morton D. Clifford, district attorney, and W. H. Holmes, for respondent.

LORD, J. The defendant was indicted for the larceny of certain cattle, tried and convicted, and from the judgment of conviction brings this appeal to this court. There are numerous assignments of error, but, after an attentive examination of them, we are satisfied there is but one that is material and error. The court instructed the jury that "when property recently stolen is found in the possession of any person, such possession raises a presumption of guilt, and unless he shows that he came honestly into the possession of said property the law will presume that he stole the same." The objection to this instruction is that the weight to be given to fact or circumstance is, under our statute, to be left to the jury; that the court is not authorized to pass upon the weight to be given to any circumstance, or to direct the jury in reference thereto. It is often said that the recent possession of stolen property by the prisoner, unexplained, raises the presumption that he is the thief, and that this presumption shifts the burden from the state to the prisoner. But the presumption raised by such circumstances is one of fact, from which the jury may infer guilt. There is no legal presumption of guilt from the recent possession of stolen property.

In *Conkwright v. People*, 35 Ill., 204, it was held error to instruct a jury, upon a trial for larceny, that possession of stolen property soon after it is stolen is of itself *prima facie* evidence of theft by the possessor, and the burden of proving his posses-

¹ See note.

sion to have been honest is there thrown upon him. The question is undoubtedly a vexatious one, and upon it, as Mr. Bishop says, "all sorts of utterances are to be found in the books." 2 Bish. Crim. Proc., § 740. But we regard it as a question of fact and not of law, to be submitted to the jury, and for them to determine whether the defendant is the guilty party or not. In *Curtis v. State*, 6 Cold., 9, the court say: "The possession of such a chattel as a horse two months after the theft is a circumstance to be considered by the jury; but it does not, even unexplained, raise a conclusive presumption of the prisoner's guilt. The jury may, and should, give it proper thought as evidence; but the matter is for them, and they are not bound in such case to convict the prisoner unless they are, upon the whole evidence, satisfied of his guilt." In *State v. Hodge*, 50 N. H., 510, this whole subject, and the authorities upon it, are ably and thoroughly reviewed, and the result there reached is in conformity with our views.

We think the instruction was error. The judgment must be reversed and a new trial ordered.

NOTE.—See *Smith v. The People*, ante, page 80, and note, as to presumption arising from possession of property recently stolen in prosecution for burglary and receiving stolen goods.

PEOPLE v. SHAW.

(57 Mich., 403.)

LARCENY: Procedure—*Legerdemain with cards held larceny.*

LEGERDEMAIN WITH CARDS.—S. introduced himself to B. as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means used for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted B. to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and B. succeeded each time in drawing the card, J., a confederate of S., came up, appearing to be a stranger, and inquired what they were doing, and S. told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. S., after some talk, said that B.

could draw the fifty-pound card. J. offered to bet \$100 that he could not, and held out to S. what seemed to be a roll of bills. S. said he had not the money, but had a \$300 check. J. said he did not want the check; he wanted money. S. asked B. if he had it. B. said he had not \$100, but had \$80. B., at S.'s request, handed him the \$80, and S. whispered to him to draw the marked card. He drew it, and it was a fifty-pound card, and S. at once handed the money to J. *Held, larceny.*

Error to Eaton.

Moses Taggart, attorney-general, for the people.

Frank A. Dean, for respondents and appellants.

CAMPBELL, J. Respondents were convicted of larceny from James Brown of \$80 in money, which was accomplished by means of legerdemain with marked cards. The only substantial question before us, worth noticing, is whether the fraudulent transaction, whereby the victim was deprived of his money, came within the definition of that offense. Although he was taken in while trying to aid in performing a sharp trick himself, yet this may not destroy the public wrong if one existed. Shaw and Jones were confederates in the fraud. Shaw had introduced himself to Brown as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means for getting custom in a new place was offering purchasers a chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted Brown to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and Brown succeeded each time in drawing the card, Jones came up, appearing to be a stranger, and inquired what they were doing, and Shaw told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. Shaw, after some talk, said that Brown could draw the fifty-pound card. Jones offered to bet \$100 that he could not, and held out to Shaw what seemed to be a roll of bills. Shaw said he had not the money, but had a \$300 check. Jones said he did not want the check; he wanted money. Shaw asked Brown if he had it. Brown said he had not \$100, but had \$80. Brown, at Shaw's request, handed him the \$80, and Shaw whispered to him to draw the marked card. He

drew it, and it was a blank, and Shaw at once handed the money to Jones.

There were some subsequent performances which indicated the conspiracy between the respondents, but the larceny was charged on these facts, and their purpose. The court below refused to charge the jury that they did not make out larceny. No other part of the general charge is material, as it all rested on an explanation of principles involved in holding that it might be larceny if done with intent to steal. Brown testified that he expected the money to be handed back, and that Shaw would infallibly win. The court in substance told the jury that if money is handed over to cover a wager, understanding and expecting that it will not be delivered until won, or honestly won, there is a condition that it shall not be otherwise delivered, and if the wager is fraudulent, and the whole is a swindle, the law holds the condition is not complied with. There was a further charge making the guilt of the parties hinge on their intention, and some cautions were given to the jury against allowing the misconduct of either party to lead them to a disregard of the law. The case does not very clearly show how far the exceptions went, as actually taken, but we shall assume they covered the important question as to the legal quality of the fraud.

There is some rather attenuated discrimination to be found in the books between such cheats as induce a person to give temporary custody of his property to another, who keeps or disposes of it, and those whereby he is induced to part with it out and out. We do not think it profitable to draw overnice metaphysical distinctions to save thieves from punishment. If rogues conspire to get away a man's money by such tricks as those which were played here, it is not going beyond the settled rules of law to hold that the fraud will supply the place of trespass in the taking, and so make the conversion felonious. We have a statute which provides that an indictment for larceny may include counts for false pretenses, embezzlement, and receiving or concealing stolen property, and allowing the jury to convict of either. How. St., § 9546. While this will not allow a conviction except for an offense charged, it nevertheless recognizes the kindred nature of these offenses,

and indicates a purpose to facilitate dealing with such offenders.

In *Robson's Case*, Russ. & R., 413, the circumstances were nearly like those in the present case, and where they differed, it was not in a way to negative criminality here. In that case the person whose money was alleged to have been stolen was induced to take part in a bet, and put his money in the hands of a stakeholder, who paid it over to the winner. The bet, as here, was got up by confederates, who played into each other's hands, and one of whom persuaded the victim that the bet was certain. They were convicted of larceny, and the trial judge, who allowed the conviction, reserved the point for the opinion of the judges, ten of whom met and agreed in sustaining the conviction, because, at the time of taking, the owner only parted with the possession of the money. As the opinions are not reported, it can only be inferred that the judges thought there was no *bona fide* wager which made the stakeholder anything more than the temporary bailee, and therefore the transfer and acceptance by the apparent winner were unauthorized, and operated as a felonious taking. The case is substantially like this, except that Brown made no bet, but handed his money to Shaw on the belief that there was a real bet between him and Jones. Brown himself deserves no special favor for undertaking to facilitate Shaw's knavery. But this does not help respondents, whose methods consisted in tempting weak fools into confiding in their superior cunning. Their offense is the same as if Brown had been altogether virtuous. They used just so much trickery as was necessary to get his money on a sham bet, and that was enough, as we think, to bring them within the law.

The judgment must be affirmed.

(The other justices concurred.)

STATE v. HALIDA.

(28 W. Va., 409.)

LARCENY: Property obtained by false token, etc. — Indictment — Certainty — Verbal or grammatical inaccuracies not fatal.

1. **INDICTMENT — GRAMMATICAL OR VERBAL INACCURACIES NOT FATAL.** — Neither verbal nor grammatical inaccuracies nor the misspelling of words in an indictment are fatal to it, where they do not affect the sense, and where, from the whole context, the words as well as the meaning can be determined with certainty by a person of ordinary intelligence.
2. **GUILTY KNOWLEDGE — FALSE TOKEN, ETC.** — Upon an indictment for simple larceny the state may convict by proving either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense.
3. **ELECTION.** — Where an indictment consists of two counts, each of which is sufficient as an indictment for simple larceny, the defendant cannot require the state to elect and try him on one count only, unless it appears that the counts charge separate and distinct offenses.
4. **POLLING JURY.** — In a case tried on such an indictment, after the jury had returned a general verdict of guilty, the court, upon being asked by the defendant to have the jury polled as to whether the verdict applied to both counts, stated to the jury: "I suppose you meant to find the prisoner guilty on both counts," and then directed the poll to be taken. *Held:* This was not error which could have prejudiced the defendant in this particular case, and is no ground for reversing the judgment.

J. M. Hamilton, for plaintiff in error.

Alfred Caldwell, attorney-general, for the state.

SNYDER, JUDGE. J. F. Halida was indicted in the circuit court of Callhoun county on October 17, 1885; he was tried by jury, found guilty, and on February 22, 1886, sentenced by the court to confinement in the penitentiary for two years. There was no demurrer to the indictment, but during the trial the accused took four bills of exceptions, and after the jury returned their verdict he moved the court in arrest of judgment and for a new trial, which motions were overruled and exceptions taken thereto.

The indictment, as printed in the transcript before us, contains many grammatical errors, a number of words incorrectly spelled, some of which are simply letters joined together and not words, and apart from the context could not be under-

stood. We have, however, had the original indictment brought before us, and from an inspection of it I think there is no difficulty in determining the words used in it. The chirography is certainly very bad and the spelling of some of the words equally bad, but taking the whole context together, I find no difficulty in ascertaining the words used as well as the full meaning of every sentence. In transcribing and printing the transcript the misspelling has been greatly emphasized, and in some instances exaggerated and perverted, by converting badly written words into letters which do not make words. For instance, the word written "seventy-five" is printed "sunt-five," and the word "dignity," which is written without crossing the "t," is printed "dignily." It is not difficult for a person of common or ordinary intelligence to read and understand the words and meaning of this indictment. Legible or plain writing is an accomplishment not often possessed by even good lawyers; and if courts should make legibility and accurate chirography requisites of valid indictments, prisoners would more often escape for want of these requisites than by reason of their innocence. The law is well settled that verbal or grammatical inaccuracies, which do not affect the sense, are not fatal. Mere misspelling is not fatal. Whart. Cr. Plead. & Pr., sec. 273; *Shay v. People*, 22 N. Y., 317; *State v. Gilmore*, 9 W. Va., 641; *State v. Hedge*, 6 Ind., 333. If the sense be clear, nice exceptions ought not to be regarded. And even when the sense or the word may be ambiguous, this will not be fatal, if it is sufficiently shown by the context in what sense the phrase or word was intended to be used. *King v. Stevens*, 5 East, 244, 260; 2 Hale's P. C., 193; *State v. Edwards*, 19 Mo., 674.

The indictment here contains two counts. The first count, leaving out the misspelling and interpreting the language used as the context plainly shows was the intention, and as it would be clearly understood by any one reading it, is in effect as follows: That F. J. Halida, knowingly intending feloniously to defraud one R. W. Hall of his property, on the — day of August, 1885, in the county aforesaid, feloniously did knowingly, falsely pretend to him, the said Hall, that he, the said Halida, was then and there the owner of a certain two-year-old colt, and that he would like to trade said colt to said Hall for

a dun mule, then and there being the property of said Hall and of the value of \$75, by means of which said false pretense the said Halida did then and there feloniously obtain from said Hall said mule in even exchange for said colt, with intent to defraud said Hall; whereas, in truth, the said colt did not then and there belong to said Halida, and he had no authority or privilege to use, trade or sell said colt; and whereas, in truth, the said colt so traded and given in exchange to said Hall for said mule was a stolen animal then and there and then in the possession of said Halida, and not his property, he having no right or interest therein, and knowing the same to be stolen; and so the jurors, etc., concluding as an indictment for the larceny of said mule of the value of \$75.

The second count is in the proper form of an indictment for the simple larceny of a dun mule of the value of \$75, the property of R. W. Hall, the word seventy-five being printed *sunt-y-five* and written in the original seventy-five.

Before the defendant pleaded, he moved the court to require the prosecuting attorney to try him on but one count of the indictment and elect upon which he would try him. This motion was overruled and the defendant excepted. The first bill of exceptions is to the refusal of the court to require the prosecuting attorney to make such election after the evidence-in-chief for the state had been heard and before any evidence had been offered on behalf of the defendant. None of the evidence heard on the trial of this case is certified in the record, and it does not appear from the face of the indictment that the offense charged in one count was not the same offense charged in a different form in the other count. We must, therefore, according to the rule announced by this court in *State v. Smith*, 24 W. Va., 814, regard the rulings of the circuit court as being correctly made in the exercise of its discretion from the facts before it. If there was any error in said rulings, the defendant, on whom the burden rests to show it, has failed to make it appear by the record, and therefore we cannot review the matter.

The second bill of exceptions is to the refusal of the court to instruct the jury to disregard the first count in the indictment, on the ground that the same is faulty, because in averring the false pretense the word "designedly" is not used, the

right of the defendant to trade the colt is not sufficiently negatived, and the *scienter* is not sufficiently alleged. The sufficiency of this count will be hereafter considered.

The third bill of exceptions is to the refusal of the court to instruct the jury to disregard the second count in the indictment. The objections made to this count are founded on the misspelling of the words "seventy-five" and "dignity," which we have already sufficiently considered.

After the jury had returned their verdict the defendant moved the court to set the same aside, and also to arrest the judgment, because of the insufficiency of the indictment. These motions were each overruled, and the defendant excepted. The only grounds on which the indictment is claimed to be insufficient are those stated in the second bill of exceptions and relate to the first count.

The indictment is founded on the statute, which declares: "If a person obtain by false pretense or token from any person, with intent to defraud, money or other property, which may be the subject of larceny, he shall be guilty of the larceny thereof." Sec. 23, ch. 145, Code.

This statute has been considered by the supreme court of Virginia in a number of cases, and it has been there held to be the settled law, "that, upon an indictment simply charging larceny, the commonwealth may show either that the subject of larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense." *Anable's Case*, 24 Gratt., 563, 566; *Lefwitch's Case*, 20 id., 716; *Dowdy's Case*, 9 id., 726.

Both counts in the indictment here are good as counts for simple larceny. *State v. Reece*, 27 W. Va., 375. It is therefore not important whether or not the first count is also good as an indictment for obtaining the mule under false pretenses, because under the decisions above cited all the evidence which could be introduced to sustain an indictment for obtaining the mule by false pretenses can also be introduced in support of an indictment for simple larceny, the legal offense as well as the punishment in both cases being precisely the same. *Dull's Case*, 25 Gratt., 965; *Fay's Case*, 28 id., 912.

But it seems to me that the first count is also sufficient as an indictment for obtaining the mule by false pretense. That it

is such, I think is fully shown by the decision of this court in *State v. Hurst*, 11 W. Va., 54. The indictment in that case, in respect to charging the offense, is substantially the same as it is here. It is true, here the word "designedly" is not used, but the word "knowingly," which is used, taken in connection with the word "falsely" by which it is immediately followed, is sufficiently comprehensive to fulfill the requirements of the law, without using also the word "designedly." The pretense could not be knowingly false without at the same time being designedly false. The *scienter* or knowledge is the essential element by which the act of pretense is to be judged and characterized. In *Commonwealth v. Hulbert*, 12 Mete. (Mass.), 446, the charge was that "the defendant designedly and unlawfully did falsely pretend," etc., omitting the word "knowingly;" and the indictment was nevertheless sustained. The word "knowingly," I think, is at least the equivalent of the words "designedly and unlawfully," and therefore, the latter being sufficient without the former, the former must be sufficient without the latter. I see nothing in the objection that this count does not sufficiently negative the right to trade the colt. It is alleged that the colt was stolen property and the defendant knew it, and, in addition to this, it is charged that the colt was not the property of the defendant "and he then and there having no authority or privilege to use, trade, barter or sell" it. This latter is not in the form of a direct charge, and therefore might not, of itself, be sufficient; but following as it does the direct charge that the colt was stolen property and the defendant knew this fact, it might be treated as surplusage without affecting the validity of the indictment. The law would presume that a person having in his possession property which he knew to be stolen property had no authority to trade or sell it. But be this as it may, the indictment being good, as we have seen, for the offense of simple larceny, the court did not err in refusing to arrest the judgment, nor in overruling the motion for a new trial because of the insufficiency of the indictment.

The only other exception is that contained in the fourth bill of exceptions, wherein it is stated, after the jury had returned into court with their verdict and the same had been read by the clerk, the defendant's counsel moved the court to interro-

gate the jury whether or not they meant to find the prisoner guilty on both counts of the indictment, and before doing so the court said: "I suppose, gentlemen of the jury, you meant to find the prisoner guilty on both counts," and then directed the poll to be taken, and in taking the same one of the jurors responded, "as I understand it we had no jurisdiction of the second count," and the court replied that they had; the said juror then said the verdict was his on both counts. To these remarks of the court the defendant excepted.

I cannot see how these remarks could have prejudiced the defendant. The circuit court had held both counts of the indictment good and refused to require the state to elect or try the defendant on but one of the counts. This court has affirmed these rulings of that court; the defendant was therefore tried on both counts. The verdict was a general one and had been returned and read before any remark was made. The court and not the jury finds the punishment. So that, it seems to me, the jury having found and delivered their verdict without any expression from the court, it could make no difference whatever to the defendant whether he was found guilty on one or both counts, there being no claim that both counts were not for the same offense. The first remark of the court, therefore, while it might be improper in some cases and ought not to have been made even in this, still as we can see from the record in this case that it could not have prejudiced the defendant, it affords no ground for disturbing the verdict. The second remark of the court to the jury was not objectionable. It was simply a statement of the law which it had before declared when it overruled the defendant's motion to require the state to try the case on one count of the indictment only. As a matter of law the defendant was tried on both counts and the court had the right to so tell the jury.

Upon the whole record, I see no error to the prejudice of the defendant and the judgment must therefore be affirmed.

Affirmed.

PEOPLE v. LANGE.

(56 Mich., 549.)

LARCENY: *Procedure — Indictment — Joint offense.*

Parties jointly implicated in a larceny may be indicted or informed against separately.

Error to the Superior Court of Grand Rapids.

Moses Taggart, attorney-general, for the people.

Emil Dapper, for appellant.

CAMPBELL, J. Respondent was convicted of larceny. The questions raised by the defense here, so far as there is anything in the record to present them, all go to the propriety of indicting or informing separately against two persons who are implicated in the same transaction. One Helena Lange was so informed against separately, and this defendant insisted there should have been a joint prosecution. No authority is presented which appears to favor any such notion, and such was never the common-law rule except as to some offenses which cannot be committed by single persons at all. In most cases there is no difficulty in convicting one or more of persons charged jointly and acquitting others, and there is no legal objection to trying each offender separately by leave granted, and possibly without. No one can be convicted without proof of individual guilt, and it must be presumed that was shown here.

The conviction must be affirmed, and the court below advised to sentence.

(The other justices concurred.)

PEOPLE v. LUBY.

(56 Mich., 551.)

CRIMINAL LAW: *Jury trial — Kalamazoo recorder's court.*

A party tried for a criminal offense in the recorder's court of Kalamazoo is entitled to a jury of twelve men, and a conviction by a jury of six men will be quashed.

Error to Kalamazoo.

Moses Taggart, attorney-general, for the people.

Wm. A. Luby, for respondent and appellant.

COOLEY, C. J. The respondent was convicted in the recorder's court of Kalamazoo of a criminal assault and battery, on a trial by a jury of six. He demanded a jury of twelve. Twelve is the constitutional number of jurors in this state. *Hill v. People*, 16 Mich., 351. The constitution makes an exception for courts not of record (art. 6, § 28); but by the statute creating the recorder's court of Kalamazoo, it is expressly declared to be a court of record. Local Acts, 1883 [No. 337], pp. 677, 694. It does not, therefore, come within the exception.

The conviction must be quashed.

(The other justices concurred.)

SWALLEY ET AL. V. THE PEOPLE.

(116 Ill., 247.)

LIMITATIONS: *Rule as to statute of, when a nolle prosequi is entered.*

1. BURGLARY — STATUTE OF LIMITATIONS — TIME OF FORMER PROCEEDINGS NOT COUNTED.— By section 315 (R. S. 1874, ch. 38) of the Criminal Code, indictments for burglary are barred after three years; but by section 318 of the same chapter the time during which any former proceedings were pending for the same offense, and which have been quashed, reversed on error, or set aside, is not counted in determining such three years. It is held that the words "set aside" are broad enough to include an indictment terminated by the entry of a *nolle prosequi*.
2. IDENTITY OF THE OFFENSE.— The identity of the offense for which the former proceedings were pending may be shown by other evidence than by a comparison of the indictments themselves

Writ of error to the Circuit Court of Sangamon County; the Hon. Win. L. Gross, judge, presiding.

Murray & Mitchell and *G. W. Murray*, for plaintiffs in error.

Geo. Hunt, attorney-general, for the people.

SHELDON, J. In this case John Swalley and Daniel Overstreet were convicted of the crime of burglary. The only question which is presented is upon the statute of limitation of three years. The crime was committed in the month of August, 1881. The indictment was found at the February term of court, 1885, and charged that John Swalley and Daniel Overstreet, on the 2d day of February, 1885, at the county of Sangamon, in this state, a certain building, the same being a certain office of John Morris, Patrick Harris, and Hannah E. Hutton, partners as Morris, Harris & Co., did burglariously break and enter, etc. To avoid the bar of the statute of limitations the people introduced in evidence an indictment found at the May term, 1884, of the court, which charged that John Swalley, Daniel Overstreet, James Arnold and Richard Mines, on the 1st day of May, 1884, at the county of Sangamon, in this state, a certain building, the same being a certain mill of John Morris, Patrick Harris and Hannah E. Hutton, partners as Morris, Harris & Co., did burglariously break and enter, etc. At the October term of the court, 1884, the state's attorney entered a *nolle prosequi* to that indictment, and the court ordered that the defendants therein be discharged, which was done on December 29, 1884. And the people made proof by the testimony of witnesses that the offenses charged in the two indictments were one and the same offense. This proof was made against the objection of the defendants that the question of the identity of the offense charged in the two indictments could only be determined by an inspection and comparison of the indictment without the aid of extraneous circumstances. *Durham v. The People*, 4 Scam., 172, is referred to by defendants' counsel as sustaining the objection. This is evidently a misapprehension of that decision. That was a case of demurrer to a plea of a former acquittal, and it was said the question whether the indictments were for the same offense must be determined by an inspection of the indictments, as nothing but the facts appearing from the record were pleaded. That does not conflict with the rule that the identity of the offense may be shown by parol evidence. 3 Greenl. Ev., § 36; Whart. Crim. Pl. & Pr., § 481.

Section 318 (R. S. 1874, ch. 38) of the Criminal Code is as follows:

"Where an indictment, information or suit is quashed, or the proceedings on the same are set aside, or reversed on writ of error, the time during the pending of such indictment, information or suit so quashed, set aside or reversed shall not be reckoned within the time limited by this act so as to bar any new indictment, information or suit for the same offense."

If the time of the pendency of the first indictment be excluded, the three-years limitation had not run, and the bar of the statute had not accrued at the time of the finding of the second indictment. Whether the time during which the first indictment was pending is not to be reckoned depends upon whether the proceedings on the first indictment were "set aside" within the meaning of the section above cited. The section names three modes of disposition of the indictment: quashing it, reversal of the proceedings thereon on error, and setting aside the proceedings on it. The first two are specific modes; the last is general. To "set aside" is very broad in scope,—“to defeat the effect or operation of,”—and we think it may well be held to embrace here every other mode of defeat of the proceedings on an indictment than quashing it and reversal on error; and so that the manner of disposal of the first indictment amounted to a setting aside of the proceedings under it, and came within the saving clause of the section.

The judgment will be affirmed.

SAMPLE V. THE STATE.

(104 Ind., 289.)

MALICIOUS TRESPASS: *Indictment — Trivol — Instructions — Oral statements by court — Reversal.*

1. **INDICTMENT.**—An indictment charging that the defendant did "unlawfully and maliciously injure a certain cow, the property of B., then and there being, and there unlawfully and maliciously running, striking and beating said cow with a whip, stick," etc., while somewhat confused, is not so uncertain that the supreme court will reverse the judgment for failure of the lower court to sustain a motion to quash the indictment.

2. WHEN VALUE OF PROPERTY NEED NOT BE STATED.— When it is averred that the property, or the owner thereof, has been damaged in a certain amount, the value of the property injured need not be stated.
3. TRIAL—INSTRUCTIONS—ORAL STATEMENTS BY COURT.— Where written instructions are asked and given, the making of prefatory oral statements by the court is not to be commended; but where it appears that no harm was done, there will be no reversal on that account.

From the Hancock Circuit Court.

J. A. New and *J. W. Jones*, for appellant.

F. T. Hord, attorney-general, and *W. B. Hord*, for the state.

MITCHELL, J. The appellant was prosecuted for maliciously injuring property. After laying the venue, it is charged in the affidavit that on a date mentioned the defendant did "unlawfully and maliciously injure a certain milch cow, the property of Ira Bevil, then and there being, and there unlawfully and maliciously running, striking and beating said cow with a whip, stick and club," etc. The appellant insists that the *gravamen* of the charge is that the cow was "unlawfully and maliciously running," etc. We think, however, that the fair import of the charge is that the defendant injured the cow by then and there unlawfully and maliciously running, striking and beating "*said cow*," etc. While there is some confusion in the language employed in describing the particular manner in which the injury was inflicted, it is certain that it is sufficiently charged that the defendant did unlawfully and maliciously injure a certain milch cow, the property of the prosecuting witness, and that the injury was inflicted by striking and beating the cow in the manner described. Under a statute which requires this court to disregard mere technical errors, and defects which do not prejudice the substantial rights of the defendant, we should not feel authorized to reverse the ruling of the court in refusing to quash the affidavit for the supposed uncertainty alluded to. Sec. 1891, R. S. 1881.

It is also made a ground of objection that the value of the property injured is not stated in the affidavit. We think it is only necessary to charge the amount of the damage done to the property or its owner in consequence of the injury to it. *State v. Sparks*, 60 Ind., 298; *State v. Pitzer*, 62 Ind., 362. The

point was made and decided adversely to the appellant in the case of *Kinsman v. State*, 77 Ind., 132.

At the proper time counsel for the appellant requested that the court should instruct the jury in writing. Certain written instructions were also presented to the court, with the request that they be given to the jury. The instructions so asked by the defendant were given, the court prefacing the reading of them to the jury with the following oral statement: "Gentlemen, defendant's counsel have asked me to give the following instructions." This oral statement was excepted to, and it is now insisted that the judgment ought to be reversed because the court made it. The making of such statements,—doubtless through inadvertence,—is a practice not to be commended. The habit was commented upon and disapproved in *Dodd v. Moore*, 91 Ind., 522. To what was there said nothing need be added, except to say that in a doubtful case such a suggestion might require a reversal of the judgment. As the oral statement was not and did not purport to be any part of the charge of the court to the jury, it did not violate the rule which requires the court to instruct in writing when so requested; and, in the absence of anything to indicate that the verdict was not well supported by the evidence, or that the appellant was possibly prejudiced by the remark, it cannot be made ground for reversal.

The judgment is affirmed, with costs.

STATE V. CANTIENY.

(34 Minn., 1.)

MANSLAUGHTER: Indictment — Venue — Resisting arrest — Justifiable homicide — Instruction — Degree of crime — Ordinance — Construction of ordinance — Public offense — Evidence — Dying declarations — Newly-discovered evidence.

1. **INDICTMENT — VENUE.**— Upon the trial of an indictment the venue may be shown indirectly and circumstantially.
2. **JUSTIFIABLE HOMICIDE — RESISTING ARREST.**— In resisting an attempted

arrest by a peace officer, even though the arrest be unlawful, the killing of the officer by shooting him is not justifiable, when there is neither danger of great bodily harm or other felony being committed by the officer, nor a reasonable apprehension of such danger in the mind of the person whose arrest is attempted.

8. MURDER TRIAL — INSTRUCTION — DEGREE OF CRIME.— Upon the trial of an indictment for murder, evidence considered as sustaining a conviction for manslaughter in the second degree. An instruction of the court to the jury that the case did not justify a conviction for manslaughter in either the third or fourth degree was not erroneous.
4. ORDINANCE, TITLE OF — MISDEMEANORS AND BREACHES OF THE PEACE.— A city ordinance entitled "An ordinance relative to misdemeanors, breaches of the peace and disorderly conduct," imposing the penalty of fine and imprisonment for public intoxication, for making any noise, riot, etc., and prescribing some other offenses, *held* not subject to the objection that it violated a requirement of the city charter that the subject of every ordinance should be expressed in its title, and that no ordinance should embrace more than one subject.
5. ORDINANCE IMPOSING COSTS OF PROSECUTION.— The charter only authorized the penalty of a fine and imprisonment. The ordinance added "costs of prosecution." This clause of the ordinance *held* void, but the remainder of the ordinance valid.
6. PUNISHMENT LEFT TO DISCRETION OF COURT.— An ordinance is not invalid by reason of the amount of the fine or period of imprisonment being left to be determined in each case by the discretion of the court, within a prescribed limit.
7. ORDINANCE CONSTRUED.— The "noise" which the ordinance prohibited construed to mean unreasonable noise, of a nature to disturb the community.
8. TRIAL — EVIDENCE IN REBUTTAL.— Evidence offered by the state in rebuttal, which should have been introduced at an earlier stage of the trial, may be received in the discretion of the court.
9. VIOLATION OF CITY ORDINANCE — PUBLIC OFFENSE — ARREST.— The violation of a city ordinance, punishable by fine or imprisonment, is a "public offense" authorizing the arrest of the offender without a warrant, by a peace officer (policeman) in whose presence the offense is committed.¹
10. DYING DECLARATION.— Proof of the circumstances under which a dying declaration was made, *held* sufficient to warrant the conclusion of the court that it was made under the conviction of impending death, and that it was admissible in evidence.¹
11. DECLARATION IN WRITING, WHEN ADMISSIBLE.— Dying declarations in writing not inadmissible, although the facts were drawn out from the deceased and afterwards written down by another and read to the deceased, he assenting to the truth of the written statement.
12. INSTRUCTIONS — NEWLY-DISCOVERED EVIDENCE.— Various points respecting the charge of the court, and relating to the claim of newly-discovered evidence, considered.

¹ See note.

Appeal by defendant from an order of the District Court of Hennepin County, Koon, J., presiding, refusing a new trial.

W. J. Hahn, attorney-general, and *F. F. Davis*, for the state.
Woolley & Reed, for appellant.

DICKINSON, J. The defendant was tried in Hennepin county upon an indictment charging him with the murder of Robert Laughlin in the city of Minneapolis. By verdict of the jury he was found guilty of manslaughter in the second degree. Upon a case, and upon affidavits presented as proof of newly-discovered evidence, a new trial was sought, but was refused, and the defendant appealed to this court.

It is claimed that it was not proved that the offense was committed in the county of Hennepin, where the indictment was found; and it is true that no witness testified directly that such was the fact. Yet there is abundant evidence satisfactorily, although somewhat indirectly, proving the venue. Many witnesses, through the use of such words as "here," "here in Minneapolis," and "in this city," and otherwise, locate the commission of the offense concerning which they testified in the place where the trial was had, which also appears to have been the city of Minneapolis. The court was sitting in Hennepin county. Enough is shown upon this point by the testimony of the witnesses Hein, Pray and Little, as well as by other evidence. The proof was sufficient, although it was indirect. *State v. Grear*, 29 Minn., 221. It was shown, and was not controverted, that Laughlin was a police officer of the city of Minneapolis, and engaged in the discharge of his duties as such on the occasion under consideration. He was shot by the defendant upon the street at about 3 o'clock in the morning of July 26, 1884, and died a few days subsequently from the wound then received.

The defendant, with two companions, was in the streets of the city at the hour above named. They had been drinking to some extent, and, as the evidence tended to show, were somewhat intoxicated, noisy and disorderly. The evidence also goes to show that the deceased attempted to induce the three men to retire from the streets; that they resisted his efforts and tried to get his club away from him; that, the officer sig-

naling for assistance, the three men then passed along the street, kicking and striking the street-signs as they went, then stopped and began "scuffling;" that the officer then arrested them. After the arrest, the defendant, attempting to escape, ran along the street, pursued by the deceased, who repeatedly called upon the defendant to stop; that during this pursuit, and before the deceased had discharged his pistol, although he had attempted to discharge it, the defendant drew a revolver from his pocket. The defendant still fleeing, the deceased shot at him, but without effect. The defendant instantly turned and shot the deceased, inflicting a fatal wound.

It appears from the evidence that the defendant knew that the deceased was a police officer. It is claimed that the verdict was not justified by the evidence. In deciding this question it is immaterial whether we regard the arrest by the officer as unauthorized and illegal or as the lawful exercise of police authority. In either view of the case the evidence justifies the verdict. One has no legal right to kill another to prevent a mere trespass, unaccompanied by imminent danger of great bodily harm or other felony, and which does not produce a reasonable apprehension of such danger. An attempted unlawful arrest may be resisted by means not greatly disproportionate to the injury threatened, but the killing of the assailant is not justifiable when there is neither danger of great bodily harm or other felony being committed, nor reasonable apprehension of such danger. *Noles v. State*, 26 Ala., 31; Gen. St. 1878, ch. 94, § 10. And the rule is the same in a case where one having been unlawfully arrested attempts to escape. *Reg. v. Allen*, 17 Law T. Rep. (N. S.), 222. In such cases the right to kill does not arise unless, in the course of a lawful and not disproportionate resistance of the arrest, the offending party so conducts himself that it becomes necessary, or apparently necessary, to kill him in order to prevent the commission of great bodily harm or other felony.

At the common law the taking of life, when not so justified, was at least manslaughter, and under some circumstances was even murder. *Com. v. Carey*, 12 Cush., 246; Roscoe, Crim. Ev., 576 *et seq.*; 1 Hale, P. C., 457, 458.

Upon the question of justification the case was submitted to the jury upon instructions which were substantially in accord-

ance with the defendant's request. The jury were warranted in concluding that the defendant was not actually or apparently subject to any danger of great bodily harm, but only to a mere arrest, and that any danger to which he might be exposed from the officer using his pistol might have been avoided by submitting to the arrest. It was the duty of the defendant thus to submit rather than to take the life of the officer. By the verdict the question of justification was conclusively determined against the defendant.

The statute thus defines the offense of which the defendant was convicted:

"The killing of a human being by another in a heat of passion, upon sudden provocation, or in sudden combat, intentionally, but without premeditation, is manslaughter in the second degree."

"Whoever unnecessarily kills another, except by accident or misfortune, and except in cases mentioned in subdivision 2 of section 5 of this chapter" (which relates to justifiable homicide), "either while resisting an attempt by such other person to commit any felony, or to do any other unlawful act, or after such attempt has failed, shall be guilty of manslaughter in the second degree."

"The killing of a human being by another, without a design to effect death, but with a dangerous weapon, or in a cruel and unusual manner, in the heat of passion, upon sudden provocation, or in sudden combat, is manslaughter in the second degree." Gen. St. 1878, ch. 94, §§ 22, 23, 24.

In some possible views of the case, not necessary to be considered, since the verdict was for a less offense, the defendant might have been found guilty of one of the higher degrees of criminal homicide. In any possible view of the case, and upon the undisputed facts, the killing was, if not justifiable, at least manslaughter in the second degree, as above defined. If the arrest was lawful, and defendant's resistance unlawful, the correctness of the result already indicated is still more apparent. The only degrees of criminal homicide less than that expressed in the verdict are the third and fourth degrees of manslaughter.

The court, in effect, instructed the jury that this case could not fall within either of those classes. The instruction was

correct. The only part of the definition of the third degree of manslaughter which would be claimed as possibly applicable to the case is that which declares the offense to be an *involuntary* killing, not constituting manslaughter in the first or second degree. By the defendant's own testimony,—and no evidence presents the case in a light more favorable to him,—the killing of the officer by the defendant was not in legal contemplation “involuntary.” He admits that he shot at the deceased, although, as he says, without taking aim.

By the terms of the statute the case is excluded from the provision under consideration. Manslaughter in the fourth degree consists: *First*, of a killing with a weapon not dangerous, etc.; which, of course, has no reference to a case of intentional shooting with a loaded pistol. *Second*. “Every other killing of a human being by the act, procurement or culpable negligence of another, where such killing is not justifiable or excusable, or is not declared in this chapter murder or manslaughter of some other degree, is manslaughter in the fourth degree.” Gen. St. 1878, ch. 94, §§ 31, 32.

Upon the undisputed facts of this case the act of the defendant was either justifiable or it was manslaughter in the second degree, or a criminal homicide of a still higher degree. We do not hesitate to declare this as a necessary legal conclusion. It follows that the statute last recited is inapplicable, as is apparent from its terms, and it was proper for the court to so instruct the jury. *State v. Rheams*, 34 Minn., 18; Gen. St. 1878, ch. 114, § 11.

The receiving in evidence of an ordinance of the city of Minneapolis is assigned as error. The ordinance is entitled “An ordinance relative to misdemeanors, breaches of the peace and disorderly conduct.” It declares that any person who shall make “any noise, riot, disturbance, or improper diversion” shall, upon conviction, be liable to “a fine not exceeding \$100 and costs of prosecution, and imprisonment for a period not exceeding ninety days, either or both, at the discretion of said court.” It also subjects to the same penalties persons found in a state of open or notorious drunkenness in any street or public place in the city. The ordinance also contains provisions relating to persons found lying in wait or concealment

with intent to commit crime, to riot, to indecent and immoral conduct, and cruelty to animals.

It is first objected that the ordinance does not conform to a requirement of the city charter, which is that "the subject of every ordinance shall be expressed in its title, and no ordinance shall embrace more than one subject." The ordinance is not a violation of this requirement; such restrictive provisions have been generally, from obvious necessity, construed liberally, and the exercise of conceded legislative power has not been interfered with, and the express legislative will declared of no effect unless it has been clear that the purposes of the restrictive law have not been accomplished. *State v. Gut*, 13 Minn., 315 (341); *State v. Cassidy*, 22 Minn., 312. The title, while not specifying the acts which, by the terms of the ordinance, are made criminal, is so suggestive of the nature and scope of the whole enactment that we deem it to have been sufficient to serve the purposes of the charter restriction; that is, to proclaim the general character of the ordinance, and to prevent its enactment being unadvisedly or fraudulently accomplished. Nor does the ordinance embrace more than one subject, as that language has been and should be construed. *County of Ramsey v. Heenan*, 2 Minn., 281 (330); *Tuttle v. Strout*, 7 Minn., 374 (465); *City of St. Paul v. Colter*, 12 Minn., 16 (41); *State v. Gut*, *supra*; *State v. Cassidy*, *supra*. The one purpose and whole scope of the ordinance is to prohibit certain acts derogatory to peace, good order and morals, and to enforce the ordinance by proper penalties; and all this may be comprehensively said to be the subject of the ordinance. It surely is not necessary that a separate ordinance be enacted with respect to each distinct act to be prohibited.

It is further objected that the ordinance is invalid because the penalty prescribed adds to the fine which may be imposed the costs of prosecution, which is not in terms authorized by the charter. Assuming, as we do, that the ordinance contemplates the costs authorized by its terms to be an imposition in addition to the fine which one convicted may be required to pay as a penalty or punishment, we deem it unauthorized by the charter. Costs were unknown to the common law, and the power to impose costs must be found in the statute, or it

does not exist. Bish. Crim. Proc., § 1312; *State v. Kinne*, 41 N. H., 238. The power to punish by fine does not include the power to add to such a fine as may be deemed a proper penalty for the offense committed, the costs of the prosecution also. But this renders the ordinance void only in respect to the provision as to costs. Otherwise it is valid, complete, and enforceable. The effect and operation of the remainder of the ordinance is not affected by the taking away from the enactment of this unauthorized provision; nor is there reason to suppose that the action of the council in framing or adopting the ordinance was affected in any way, as regards the remainder of the enactment, by considerations involved in the clause which is invalid. It is therefore to be sustained, except as to the words "and costs of prosecution," which are unauthorized. *State v. Kantler*, 33 Minn., 69 (S. C., 5 Am. Cr. R., 581), and cases cited. The ordinance was not invalid because the amount of fine or period of imprisonment was left to be determined in each case by the discretion of the court, the extreme limit only being prescribed. 1 Dill. Mun. Corp., § 341 (275). The ordinance was effectual to prohibit drunkenness in the streets. We think, too, that it was a valid prohibition of the making of any unreasonable "noise" of a nature to disturb the community, such as shouting upon the streets at night, even though it should so happen that no one was, in fact, aroused from sleep, alarmed, or disturbed. It would always be a question to be determined upon trial whether any particular conduct was of such a character as to be within the prohibition.

As to so much of the ordinance, at least, as is applicable to the facts in this case, it is expressly authorized by the charter. The state first offered the ordinance in evidence upon rebuttal. It was within the discretion of the court to receive the evidence at that stage of the trial. *State v. Staley*, 14 Minn., 75 (105). The tendency of this evidence was to show that the officer had authority to arrest the defendant, and hence that the defendant had no right to resist the arrest.

But it is claimed that, admitting the ordinance to be valid, and that the defendant was engaged in violating it in the presence of the officer, the officer had no right to arrest without a warrant, because, as is said, the breach of the ordinance did not constitute a public offense. We hold the contrary. The

charter expressly confers upon the police officers of the city, in addition to other powers, the powers of constables at common law and by the laws of the state. The statute of the state authorizes any peace officer to arrest, without warrant, for a "public offense committed or attempted in his presence" (Gen. St. 1878, ch. 105, § 11), although the offense does not amount to a breach of the peace. *Wahl v. Walton*, 30 Minn., 506. The term "offense" here used is defined to be "a breach of the laws established for the protection of the public, as distinguished from an infringement of mere private rights,—a punishable violation of law." Abb. Law Dict. "The doing of that which a penal law forbids to be done, or omitting to do what it commands." Bouv. Law Dict. The term "public offense" means no more. The word "public" was not intended to express the idea of a distinction between offenses made such by common law or by general statute, and those defined by a law having but a limited territorial operation. We think the term "public offense," as here employed, has the signification which would ordinarily be put upon such terms, and bears no peculiar meaning. It includes all such violations of municipal ordinances as are punishable by fine or imprisonment. The right to arrest without warrant for infractions of such ordinances was assumed in *Wahl v. Walton*, *supra*, although it was not questioned in the points presented for discussion. The right is sustained in *Seirle v. Neeves*, 47 Ind., 289; *State v. Freeman*, 86 N. C., 683; *Mitchell v. Lemon*, 34 Md., 176; *Roddy v. Finnegan*, 43 Md., 490. The charge of the court upon this point was not erroneous, nor was it for any reason prejudicial to the rights of the defendant.

It is assigned as error that the dying declaration of Laughlin was received in evidence. It was made in the morning, two days after the wound was received. Laughlin died in the evening of the same day. It appeared that a priest of the Roman Catholic church had administered to Laughlin the last rites of that church, prescribed for dying persons, in which Laughlin had intelligently participated, as only one familiar with the rites of the church could do. At some time before the declaration was made, Laughlin, upon being asked whether he felt as though he was going to die, replied that he did; and said that he did not think that he would live to see the trial.

And shortly after the declaration in question he said that it was hard to die. The wound was of a nature to naturally cause in the mind of any person grave apprehensions that it might be fatal. It was for the court to consider, from the evidence, whether the declaration was made under circumstances rendering it admissible, and to determine whether it should go to the jury as evidence. 1 Phil. Ev., 296-298; Steph. Dig. Ev., ch. 4, art. 26; Whart. on Hom., 768.

The facts and circumstances to which we have referred seem to us to have been sufficient to warrant the conclusion of the court that the declaration was made under a conviction of impending death, and without hope of recovery. It was therefore properly allowed to go to the jury. *Com. v. Casey*, 11 Cush., 417; *Murphy v. People*, 37 Ill., 447; *People v. Sanchez*, 24 Cal., 17; *Smith's Case*, Lew. Cr. Cas., 81; Whart. on Hom., 748 *et seq.* The declaration thus presented was in a writing which was made by one Carrigan, in the presence of Laughlin and of one Kennedy. The facts of the case were drawn out from Laughlin by Carrigan, who then put the same in the writing. Some facts were suggested by Kennedy, to which Laughlin assented. The writing was then read to Laughlin, who assented to its correctness by a signature, and by responding "Yes," in answer to a question as to whether he swore to it. The manner in which the instrument was made was not such as to render it inadmissible as the declaration of the deceased. Whart. Crim. Ev., § 300; *Com. v. Casey, supra*; *Murphy v. People, supra*; *People v. Sanchez, supra*.

A preliminary statement in the writing as to the present condition of the declarant, not read to him, nor made by him, formed no part of the declaration, and was properly excluded.

The point cannot be sustained that the court, in its instructions as to what would justify the homicide, omitted the element of danger, *reasonably appearing to the defendant to exist*, although not actually existing. The charge, as given, was not subject to such objection.

The sixteenth request, refused by the court, was inapplicable to the uncontroverted facts of the case. The killing was not "without excessive force." The resistance of a mere arrest, although unlawful; by shooting the wrong-doer and taking his

life, is "excessive." The law upon this subject was fully given to the jury in other parts of the charge.

The seventeenth request, refused, involved the proposition which the court was requested to present to the jury, that an arrest of the defendant, "merely because he was noisy on the street, late at night," was unlawful. As we have already said, unreasonable noise, of a nature to disturb the community, was a penal offense under the ordinance, and a just cause for arrest. The court could not, without qualification, present this proposition as a statement of law.

The fourteenth request was fully and more satisfactorily presented to the jury in response to the eleventh request, and in other parts of the charge.

The refusal of the eighteenth request is claimed to have prejudiced the defendant, because the principle involved affected the grade of crime of which the defendant might be deemed guilty. Granting this to be so, it furnishes no reason for a new trial in this case; because, as has been already declared, the conviction was for the lowest degree of criminal homicide legally possible, upon the undisputed facts.

The court properly omitted the words "common or statute," in presenting the defendant's twenty-first request to the jury. The substance of the request was that the offenses for which an arrest might be made without a warrant embraced "only acts or omissions prohibited by positive law, common or statute." This would naturally be understood by the jury as excluding municipal ordinances. We have already declared that arrests may be made without a warrant for a breach of penal ordinances.

The twenty-fourth and twenty-fifth requests relate to the sufficiency of the evidence to warrant a conviction for murder in either degree, and even if erroneous, as we think they were not, it is now apparent that they did not actually prejudice the defendant. His conviction for manslaughter in the second degree has rendered unimportant considerations relating only to the higher degrees of criminal homicide. Respecting alleged errors which might have led the jury to return a verdict of guilty of any of such higher degrees of crime, it is now enough to say that no such result was accomplished.

These remarks are applicable to several other exceptions to

portions of the charge relating merely to the higher offenses, of which the defendant now stands acquitted.

It remains only to consider the claim of newly-discovered evidence. What is alleged in the affidavit of Strathdee would be merely emulative evidence, and not a sufficient ground for a new trial. *State v. Wagner*, 23 Minn., 544. The affidavit of McAlpine goes to show that Laughlin was intoxicated and drinking at a time about three hours before the shooting; and the affidavit of Maher perhaps tends to show that he was intoxicated after the shooting, although this seems not to be very satisfactory proof of prior intoxication, in view of the uncontroverted fact that *after* he was shot intoxicating liquor was given to him. But aside from this, a new trial ought not to be granted upon these affidavits. The defendant and one of his companions, Gorman, as witnesses, detailed the occurrences with which Laughlin was connected. They had opportunity to discover, if the fact was so, that Laughlin was intoxicated. Other persons having like opportunity to know the facts testified as witnesses, yet no attempt seems to have been then made to show such fact. This alone is a sufficient reason for the refusal of the motion.

We do not find in the case any error prejudicial to the defendant. The order refusing a new trial is therefore affirmed, and the sentence of the district court will be carried into execution.

NOTE.— Arrest for a past offense without a warrant, see *Fleetwood v. Com.*, 4 Am. Cr. R., 26, and note.

Dying declarations, see *Payne v. The State*, 4 Am. Cr. R., 155, and note.

According to Bouvier "a crime is an offense against a public law."

In *Com. v. Myers*, 1 Va. Cases, 188, which is a leading case upon questions decided therein, White, presiding judge, who delivered the opinion of the full bench, in defining the meaning of the words "crime or offense," as used in the statute under consideration in that case, says:

"In legal acceptance these words are synonymous terms, although the word *crime* is often used to denote offenses of the higher grades. 1 Haw., p. 1; Blue. Com., pp. 4 and 5. In the same, fifth page of 4 Blackstone's Commentaries, we are told that crime consists in doing an act in violation of a public law; and in the second page of the same book, that the law teaches the grades of every crime, and adjusts to it its adequate and necessary punishment. *Crime*, or *offense*, then, is the doing an act in violation of a public law; and the different degrees of atrocity which attend its commission fix the degree of the crime."

Nothing is better settled by the decisions of courts than that valid municipal ordinances have the force of laws within the territorial boundaries of

the municipality, and it would seem, therefore, that the breach of a valid penal ordinance, committed or attempted in the presence of an officer of the law, would justify such officer in making the arrest without warrant, within the meaning of a statute which authorizes any peace officer to arrest, without warrant, for a "public offense committed or attempted in his presence." The above case is well considered throughout.

Homicide — Murder in first degree — Killing officer making arrest.—An attempt to make an arrest by an officer authorized to make it is of itself no provocation in law, since every person is bound to submit to the ordinary course of justice, and the officer's warrant is a protection to him for all acts reasonably required for its execution. Hence the intentional killing of an officer acting in the proper discharge of his duty must ordinarily constitute the offense of murder in the first degree. *The State v. Spaulding*, 34 Minn., 361.

Killing officer acting under void process — Provocation.—So the malicious and premeditated killing of an officer acting under void process, or without process, is murder, notwithstanding circumstances of provocation or conflict which might otherwise reduce the offense to manslaughter. *Id.*

Same — Evidence as to existence or validity of process.—But where the question of actual malice or premeditation is in dispute, and the question of the grade of the offense is open for the jury, in the case of an attempted arrest, the existence of process or its validity becomes material. Hence error in the reception of evidence of the existence or contents of a warrant (in cases where its possession is required) is presumptively prejudicial. *Id.*

Insufficient foundation for secondary evidence.—Where, upon the trial of an indictment for murder, the state undertook to justify an attempted arrest by the deceased under a warrant issued by a justice of the peace, which was claimed to be lost, before secondary evidence can properly be received of its contents the foundation must be laid therefor, by evidence sufficient to establish a reasonable presumption of its loss. The testimony of the magistrate who delivered it to the officer, "that he had not since seen it, and did not know where it was, that he had searched for it thoroughly and had not been able to find it," is not alone sufficient to raise such presumption. *Id.*

Evidence explanatory of possession of weapon.—A defendant on the trial of an indictment for killing an officer while attempting his arrest may, for the purpose of rebutting evidence of malice and of preparation to resist an arrest by the officer, show that he had armed himself in expectation of a felonious assault by another party with whom he had a quarrel, and who had threatened or attempted to kill him the same day; but evidence of the transactions out of which such quarrel arose would be immaterial and improper upon examination in chief. *Id.*

Manner of making arrest.—A party whose arrest is attempted should first be notified of the purpose of the officer. For this no particular form of words is necessary. It is enough that the officer and his business be known. Where an officer, in the first instance, used the words "You are my prisoner," held competent evidence of notification by him of his business. It is not necessary that he should exhibit his warrant before the arrest. *Id.*

Justification for killing an officer.—Whether or not in a case of homicide in resisting an officer the accused understood him to be an officer and

knew his business, and also any irregularity or want of authority in making the arrest, are matters proper to be considered in determining the question of provocation or the grade of the offense; but in no event would he be justified in killing the officer (whether the arrest were duly authorized or not) unless in self-defense in order to protect himself from great and imminent personal injury, as the case would appear to men of fair average intelligence, prudence and firmness. *Id.*

PEOPLE v. MUNN.

(65 Cal., 211.)

MANSLAUGHTER: Blows inflicted with the fist — Intent — Instructions.

1. **DISTINCTION BETWEEN MURDER AND MANSLAUGHTER.**—Death resulting from an assault made without the use of a deadly weapon, instrument, means, or force likely to produce great bodily injury (being itself an unlawful act, not amounting to a felony), is manslaughter, and not murder.
2. **THE INTENT.**—A person must be presumed to do that which he voluntarily and wilfully does in fact do, and that he intends all the natural, probable and usual consequences of his own act, but not all the possible consequences of his act.¹

Appeal from a judgment of the Superior Court of Stanislaus County, and from an order refusing a new trial.

Wright & Hazen and D. S. Terry, for appellant.

The Attorney-General, for respondent.

MORRISON, C. J. The defendant was convicted of the crime of murder of the second degree, and was sentenced to imprisonment for life in the state prison. The killing occurred in the town of Turlock, in the county of Stanislaus, on the 12th day of August, 1883, under circumstances substantially as follows: The defendant, Albert Case, the deceased, and several others, were in a saloon kept by one Ross, at the hour of 9 or 10 o'clock at night, when an exchange of words occurred between the defendant and the deceased. What the exact words were does not clearly appear from the evidence. Suffice it to say they were words of insult from the defendant, and of remonstrance on the part of the deceased. There was, however,

¹ See note.

no angry discussion, and persons present thought the defendant was jesting rather than in earnest. Case was sitting near the door, and defendant standing at the bar, of the saloon. The latter walked over to where the former was sitting, and after the exchange of some words, struck the former either two or three blows with his fist. The blows fell on the face or head of the deceased, and did not, at the time or immediately afterwards, seem to produce any serious effect. How severe the blows were does not clearly appear, but they must have been dealt with a good deal of force. The deceased was a lad of sixteen or seventeen, well developed and largely grown for his age, and was nearly or quite as large as the defendant. The morning after the infliction of the injury the deceased, Case, was found lying on the ground, dead, near the room in which he slept. The *post-mortem* examination showed that there was a fracture of the skull just above the right ear, and a large clot of blood on the inside of the skull. This came from the rupture of an artery, and was pronounced by the physician making the autopsy to be the cause of death.

The principal question in the case which we deem it necessary to consider is, did the facts, admitting them in their full force and effect, constitute murder? This degree of homicide is defined by section 187, Penal Code, to be the unlawful killing of a human being with malice aforethought; whereas, manslaughter is the unlawful killing of a human being without malice. *Id.*, § 192. "It is of two kinds: 1. Voluntary, upon a sudden quarrel or heat of passion. 2. Involuntary, in the commission of an *unlawful act not amounting to felony*; or, in the commission of a lawful act which might produce death in an unlawful manner, or without due caution or circumspection."

It may be conceded that an assault with the fist, or without the use of a deadly weapon, may be made in such a manner and under such circumstances as to make the killing murder, but the law draws a broad distinction in cases generally between an assault committed with a deadly weapon and a simple assault and battery. The former amounts to a felony, whereas the other is merely a misdemeanor. Section 240 of the Penal Code provides that "an assault is an unlawful attempt, coupled with a present ability to commit a violent injury

on the person of another. A battery is any wilful and unlawful use of force or violence on the person of another." Sec. 242, Penal Code. A battery is punishable by fine or imprisonment in the county jail, or both. Sec. 243, Penal Code. An assault with a deadly weapon, or by any means or force likely to produce great bodily injury, is declared to be a felony, and is punishable by imprisonment in the state prison. Sec. 245, Penal Code.

In the case of *The People v. Murat*, 45 Cal., 281, it was held that an assault made without the use of a deadly weapon with intent to do mere bodily harm, and not to do murder, is a misdemeanor, nothing more.

In the trial of cases of homicide committed by violence it is almost always important to consider the character of the weapon with which the homicide was committed, and all through the cases great emphasis is laid on the fact that a weapon likely to produce death was used by the accused. If the means employed be not dangerous to life, or, in other words, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder. The distinguishing characteristic respecting the two crimes of murder and manslaughter is malice. Without the presence of this element of malice the crime does not reach the higher degree of murder, but amounts simply to manslaughter.

We will consider a few of the cases in which the distinction is clearly drawn. If a party participate in a homicide, intending only to commit an assault and battery, he is guilty of manslaughter only. *Brown v. State*, 28 Ga., 200. Beating and striking a wife violently with the open hand, the blows being illegal, the killing of the wife in such manner is manslaughter. *Com. v. McAfee*, 108 Mass., 461. If A. and B. agree to assault C. with their fists, and C. receives chance blows from either, producing death, both are guilty of manslaughter. *Reg. v. Cuton*, 12 Cox, C. C., 624. When death ensues in pursuit of an unlawful design, without any intention to kill, it will be murder or manslaughter, as the intended offense is felony or only a misdemeanor. *Smith v. State*, 33 Me., 55. The case of *Wellar v. People*, 30 Mich., 16, is a very instructive one on the point we are now considering, and it was there held that "in

general, when the assault is not committed with a deadly weapon, the intent must be clearly felonious to make the killing constitute murder, . . . and in such a case the deadly intent ought to be left in no doubt." The wilful use of a deadly weapon, without excuse or provocation, in such a manner as to imperil life, is almost universally recognized as showing a felonious intent. 2 Bish. Crim. Law, §§ 680, 681. But when the weapon or implement used is not likely to kill or maim, the killing is held to be manslaughter, unless there is an actual intent which shows a felonious purpose. See cases cited in 30 Mich., 16.

It does not appear from the evidence in this case that there was any intention on the part of the defendant to kill the deceased, and the physician who made the *post-mortem* examination states that an ordinary blow would not have produced the fracture which resulted in the death of Case. It appears, too, that the blow happened by chance to fall upon that portion of the skull which is the thinnest and most easily fractured. There certainly was no design or intent on the part of the defendant that it should. If the blow had fallen a little higher or a little lower on the skull, the result, in all human probability, would not have been fatal. If death had not ensued the defendant would have been guilty of a simple assault and battery under the Penal Code, as the assault was not with a dangerous weapon or instrument, or by any means or force likely to produce great bodily injury. If the party had not died from the injury, the defendant would have been guilty of a misdemeanor only, and not a felony. The killing of Albert Case, not having been intended, but resulting from an unlawful act, not amounting to a felony, was therefore manslaughter and not murder.

We will now consider one of the instructions given by the court to the jury. It was as follows:

"Intent is generally inferred from the commission of the act. If a man knowingly and wilfully does an act unlawful in itself, and it produces harm, the law conclusively infers that such harm was intended. The law presumes that the natural, necessary and even possible consequences were intended by the author of the act. If of sound mind, the natural and proximate consequences. And if the act intended was unlawful, even the

possible consequences. So if the act produces harm not intended, it holds him responsible for all the consequences."

This instruction ignores all distinction between the intent to commit an act amounting only to a misdemeanor, and one that would, if committed, be a felony. We have endeavored to point out the distinction. In our opinion the instruction was too broad and was well calculated to mislead the jury under the circumstances of this case. The language of chief justice Shaw, in the case of *Com. v. Webster*, 5 Cush., 305, is as follows: "This rule is founded on the plain and obvious principle that a person must be presumed to intend to do that which he voluntarily and wilfully does in fact do, and that he must intend all the *natural, probable and usual* consequences of his own act."

To hold the defendant liable for all *possible* consequences of his act, and to the full extent of the rule laid down by the court, would be dangerous in the extreme.

For the reasons herein set forth, the judgment and order are reversed, and the cause remanded for a new trial.

SHARPSTEIN, J., and THORNTON, J., concurred in the opinion of Chief Justice MORRISON.

ROSS, J., concurred upon the ground last stated in the opinion.

McKINSTRY and MYRICK, JJ., concurred in the judgment and in the opinion that the instruction, as to responsibility for all *possible* consequences, was erroneous.

NOTE.—According to the above decision, if a bruiser or pugilist kills a man with his fist, it is manslaughter, but it is murder in the weak consumptive person who does the same thing with a club. The rule announced by the court is applicable only to cases which present some latent physical disability, arising from disease or habits or abnormal defect in the person killed. For example, if a person dies from the results of a slight blow on the head, and it is discovered upon examination that the skull was fractured because of a peculiar thinness of that part of the skull, and that the fracture would not have resulted from the blow but for this abnormal condition of the skull, under such circumstances the law would deal mercifully with the accused, no felonious intent appearing, and hold him guilty of manslaughter only. It is no extenuation of the offense "that the blow happened by chance to fall upon that portion of the skull which is the thin-

nest and most easily fractured," because in the skull of every human being are found parts thinner than other parts. A person may stab another on the head with a knife and produce no serious results; yet a stab inflicted with the same force may enter the eye, penetrate the brain, and produce death; and should the person who inflicted the wound be exonerated, or the degree of the offense lowered, because the blow did not happen to fall "a little higher or a little lower?"

The distinction sought to be drawn in the above case, between the attempt to commit an act amounting only to a misdemeanor, and an act that would, if committed, amount to a felony, ought to have no place in the administration of the criminal law. It would be extremely dangerous to society, and tend to a loose administration of the law, to enter into the speculation in every case of homicide as to whether the defendant intended to commit a mere assault or an offense of a higher grade. The point to be distinctly brought before the court and jury is whether there is any cause other than the wound to which death may be traced, and, if not, and the violence was sufficient to cause death, the intent with which the blow was given fixes the degree of the offense, and not the mere accidents as to whether "the blow had fallen a little higher or a little lower on the skull."

WESTON V. THE COMMONWEALTH.

(111 Pa. St., 251.)

MURDER: *Accessory — Juror — Instructions — Reasonable doubt — Malice — Intent — Evidence — Advice of counsel — Self-defense.*

1. MURDER — UNLAWFUL COMBINATION. — On the trial of one who is indicted with others for murder, but who is not alleged to have actually struck the blow causing death, it is not error to charge that the defendant was guilty if he were present at the scene of the killing, aiding and abetting in the purpose for which he and those with him were there, and the killing was in pursuance of or an incidental probable consequence of such purpose. An intent to hold possession of disputed land by a show of arms is unlawful, and draws to it the consequences of all acts done in carrying it into execution.
2. JUROR NOT DISQUALIFIED BECAUSE HE READS NEWSPAPERS. — A juror is not disqualified because he has read the newspaper accounts of the trial of one jointly indicted with the defendant, and the newspaper report of the testimony taken at the said trial, if he has not formed a fixed opinion as to the guilt of the defendant himself.
3. ADVICE OF COUNSEL NOT ADMISSIBLE TO JUSTIFY CRIME. — On the trial of one charged with murder, testimony that the defendant had consulted counsel, and had by counsel been advised that he had a legal right to maintain possession of the land, in a dispute about which the alleged murder took place, is not admissible in evidence.¹

¹ See note.

Error to the Oyer and Terminer of Allegheny County.

Absalom M. Bowser, Sherman Kelso, Milton Weston, Archibald Blakely and several others were indicted in the oyer and terminer of Westmoreland county for the murder of Obadiah Haymaker. On account of the excitement caused in the neighborhood by the circumstances of the killing, the venue of the trial was changed to Allegheny county. The defendants severed in their defense. Bowser was tried and convicted of murder in the second degree.

Subsequently, on February 17, 1885, the defendants Weston, Miller, Remaley, Johnston, Blakely and Miller were arraigned and pleaded not guilty. A severance being prayed and allowed, the commonwealth elected to try Milton Weston, and the impaneling of the jury was proceeded with. A. M. Burns, called as a juror, testified on his *voir dire* that while he had not formed an opinion as to the guilt of Weston particularly, yet upon reading the newspaper accounts of the trial of Bowser, he had formed and expressed an opinion upon the guilt or innocence of Weston and those connected with him; that the opinion was not a fixed one, but nothing more than an impression not amounting to a belief. The defendant challenged the juror for cause. Challenge overruled and juror sworn. Exception taken.

Addison Lisle, called as a juror, testified that he had read the newspaper reports of the occurrences involved in the case, of the trial of Bowser, and of testimony taken in *habeas corpus* proceedings in the case, but had nothing more than an impression as to the guilt or innocence of Weston and his associates. Challenge overruled. Juror sworn. Exception taken.

D. B. Morris, called as a juror, had read the newspaper accounts of the occurrence, of the testimony taken at the trial of Bowser, of the coroner's inquest, and of the *habeas corpus* proceedings; had formed an opinion as to the guilt of Weston and party, but not such an one as would influence him in rendering a verdict. Challenge overruled. Juror sworn. Exception taken.

J. G. Weldon, called as a juror, had read very little about the case; had formed a strong impression about the guilt or innocence of Weston and his associates, but not one which would influence him in rendering a verdict. Challenge overruled. Juror sworn. Exception taken.

W. C. McElhany, called as a juror, had read the newspaper accounts of the occurrences, and of the testimony at the Bowser trial, but had nothing more than an impression with reference to the guilt or innocence of the defendant and his associates. Challenge overruled. Juror sworn. Exception taken.

Charles McClelland, called as a juror, had not formed or expressed an opinion as to the guilt or innocence of Weston individually, but had with reference to the whole party, based on newspaper accounts of the occurrence and the testimony at the Bowser trial, but not such an opinion as would interfere with his rendering a verdict according to the law and the evidence. Challenge overruled. Juror sworn. Exception taken.

After a jury had been obtained and sworn the commonwealth gave evidence tending to establish the following case: On the 26th of November, 1883, Bowser, Remaley, Kelso and others went upon certain premises in Murrayville, Westmoreland county, on which was a natural gas well, and which for convenience are called in this report the gas well tract, and proceeded to take possession of said tract for Weston, the defendant, and went upon a derrick used for boring purposes. While they were upon the premises Obadiah Haymaker, who with others had been in possession of the premises in the interest of Pow & Emerson, came on the premises, and being told by one of the workman, "Mr. Weston's party is going to take the well," entered into conversation with Bowser, after which a shot was fired, by whom it did not appear, and Haymaker was set upon by the Weston party, clubbed over the head with a gun and beaten; his brother, who arrived on the ground about the time of this occurrence, ran up and got him away; after this the Weston party began to carry away boards from a board pile some fifty or seventy-five feet away from the derrick, and carried them over to the derrick, which they began to board up. Haymaker went to the pile to prevent the carrying away of the boards, which belonged to his employers, and met some other men; got on top of the pile; the Weston party approached armed with guns and bayonets; Bowser advanced and thrust at Haymaker with his bayonet, striking him several times; Haymaker moved about on the board pile swinging a pick-handle backward and forward; Bowser stepped back and fired; this shot was followed by a

rolley from the Weston party; Haymaker fell, was carried by a man named Taylor to a short distance from the board pile, from whence, after receiving medical attention, he was removed to his home, where he died at half-past 3 o'clock in the afternoon of the day on which the above mentioned occurrences took place. His body showed that three or four holes had been made in it, and one was from a gun shot. There was evidence that Weston had been on the ground during the trouble; that he had fired at least one shot; and that on the previous day he had hired from a gunsmith in Pittsburgh six Springfield rifles with bayonets, and six double-barreled shot guns, of the same pattern as guns produced in court, identified as those used in the affray, and had also purchased from him a supply of ball cartridges and blank cartridges, which he ordered to be sent to "M. Weston," or "M. Weston & Co.," directing the cartridges to be put up so that unused or unopened packages could be returned, saying that he did not think any of them would be used in firing.

The defendant gave testimony to the effect that in August, 1883, a party sent by Weston, who claimed to have purchased the well, went upon the well tract, and on the 7th were assaulted by the employees of Pew & Emerson; that they remained on the ground, but were again threatened; that a riot for the possession of the tract was so imminent that the sheriff was, on the 10th of September, obliged to summon a posse to preserve the peace; that after this, on the 24th of September, the Pew & Emerson party expelled the Weston party from the well tract by force; that on the day of the killing there were some one hundred and twenty-five men of the Pew & Emerson party on the ground armed with pick-handles; that a number of them stood upon the board pile striking with their pick-handles, and that the firing followed after this demonstration.

Counsel for the defendant then proposed to ask a witness if he knew the advice of Archibald Blakely, Esq., to the defendant Weston as to his title to the property? This was objected to. The defense then offered to prove that the defendant submitted his title to this property to competent counsel; that he was advised that he had a good and sufficient title in that property; that he was advised that the agreement between him

and Mr. Brunot, and others included in it, was an absolute sale of the property to him; that he was advised that he had a right to take possession of the property, peaceably if he could; that he was advised that after he had the possession of the property he had a right, he and those with him, to bear arms there for the purpose of preventing, by a show of arms, people from interfering with his possession; that he had a right to hold possession, using only such force as was necessary so to do, short of the taking of life or doing great bodily harm; that he was advised that under the constitution he had a right to bear arms in defense of his person and property; and that for the purpose as suggested in the opening — of showing the right which the defendant had to be upon the ground; the reason he had to believe that he had a right to be upon the ground, and to explain why he, and those with him, were in that vicinity, neighborhood, and upon the ground with arms; to explain why he believed, or had a right to believe, that he had a right to go there with arms; to explain how he was to take, and why he took possession of this property, and why he attempted to hold possession of the property; and to rebut the idea that might get into the minds of the jury that it was a conspiracy to go there and kill people. Objected to.

The defense then made the following offer to prove by the witness on the stand, W. H. Meehling, that he, the defendant, submitted his title to the property, on which the alleged crime was committed, to competent counsel, and was advised that his title was good, and that he could take possession of the same if he could get the possession by peaceable means. And he was advised that he might legally take there on the premises fire-arms, for the purpose of intimidation, and a show of force, to prevent himself from being dispossessed by others. And that the defendant, acting on such advice of counsel, did procure some fire-arms for the purpose aforesaid, and had them taken on the premises after he had obtained possession peaceably, and without any intention of committing unlawful violence. And that all this was done in pursuance of the advice of counsel, and this for the purpose of rebutting the inference of malice, and for the purpose of mitigating the grade of the offense, if any.

This testimony to be taken in connection with the testimony

already in evidence; and that Mr. Meehling was present at the time the advice was given. This was objected to for the following reasons:

1st. Because the witness on the stand having already stated that Colonel Blakely was the legal adviser of Weston, the defendant, the advice would be the declaration of an accomplice; therefore inadmissible.

2d. Because no advice of counsel is a legal protection for the commission of crime.

3d. Because the offer proposes to show, which the testimony could not, the intention of the defendant on the day of the commission of this offense and in the commission of the act.

4th. Because the testimony is hearsay.

5th. Because if Colonel Blakely was called as a witness to prove the advice given by him on behalf of the defendant Weston, he would not be admissible as a witness, nor his testimony received. What he could not do himself, and directly, he cannot do through another, and indirectly.

Bailey, J., after inquiring whether Colonel Blakely was the Blakely named in the indictment, and receiving an affirmative answer, sustained the objection.

The defendant presented to the court several points, which with the answers thereto are set forth in the charge of the court, which was as follows:

It becomes my duty, gentlemen, at this point to instruct you as to the principles and rules of law applicable to the facts disclosed by the testimony which has been given in your hearing. The supreme court of this state have pronounced you "judges of the law and the facts," and have in the same connection decided, "The court is appointed to instruct the jury, and their opinion is the best evidence of what the law is." Under these circumstances, in order that you may be possessed of the best evidence upon this subject in my power to give you, I propose to read from opinions of our supreme court, from approved works on criminal law, and at length from a charge of the late Chief Justice Agnew, which has been practically adopted by the supreme court and accepted as law by my predecessors and colleagues.

I here premise that you start in your investigation with the presumption of the innocence of the defendant of the

crime laid to his account. "As men do not generally violate the Penal Code, the law presumes every man innocent, but some men do transgress it, and therefore evidence is received to repel this presumption." My mind has always assented to the view of the law set forth by a distinguished writer upon the law of evidence, that "this legal presumption of innocence is to be regarded by the jury as matter of evidence to the benefit of which the party is entitled." I add that this presumption of innocence, and the kindred rule that the evidence must satisfy the jury of the criminality of a defendant beyond a reasonable doubt, are not concessions to guilt, nor contrivances by which criminals may break through the meshes of the law, but are, on the contrary, provisions for the protection of the innocent, the reasonableness and necessity of which have been demonstrated by the experience of ages. In therefore carefully applying these legal principles to the case in hand, you need feel no anxiety lest you may be letting go some of the safeguards against crime, but rest content that you are conforming to the law and sound reason. I had prepared what I shall hereafter read you, before defendant's counsel had presented their prayer for instruction. It will be seen that I had necessarily anticipated many of the subjects referred to therein, and as in most cases, I have passed upon those subjects at greater length than is usual in answer to legal points. I will at this place read and briefly answer the latter.

The court is respectfully requested by defendant's counsel to charge the jury:

1. That under the constitution of the United States and of this commonwealth, the right of the people to keep and bear arms cannot be questioned, and under the state constitution the right of acquiring, possessing and protecting property is one of the indefeasible rights of every citizen.

This point is correctly taken from our constitution, and if their provisions can assist you in determining the issue you have been sworn to try, you will apply them.

2. Whilst the law presumes every unlawful killing, with malice express or implied, to be murder, that presumption rises no higher than murder at common law — under our statute murder of the second degree — until shown by the commonwealth to be murder of the first degree. It therefore lies upon the

commonwealth to satisfy the jury of those facts and circumstances which indicate the deliberate intention, and the cool depravity of heart, and the conscious purpose which constitute murder of the first degree. Affirmed.

3. In the consideration of this cause it is the imperative duty of the jury to exclude from their minds all public clamor and prejudice; the law and the evidence should be their only guides in determining the question submitted to them, to wit: Has the commonwealth established, by clear and satisfactory evidence, that the defendant is guilty as charged? Affirmed.

4. That the burden of proof to establish the charge against the defendant is upon the commonwealth, and if the commonwealth fail to prove any one of the material elements of the crime charged, or the commission of the act of murder, or the identity of the defendant as the actor, it is the duty of the jury to acquit the defendant.

You will remember that you are not limited in your verdict to finding the defendant guilty of murder of the first or second degree, but that, if the facts and law warrant, you can find him guilty of voluntary manslaughter. The use of the phrase "the defendant as the actor," does not mean that, in order to convict the defendant, you must find that he inflicted wounds which caused death. Of this I will have more to say in the general charge. With this explanation, this point is affirmed.

5. That if the jury, in a trial for murder, can reconcile the circumstances under which the killing took place with the prisoner's innocence of an intent to take life or do great bodily harm, they are bound to do so. Affirmed, as a legal proposition.

6. Unless there was a precedent common purpose to kill or to do great bodily harm, the defendant Weston cannot be convicted, in the absence of satisfactory proof, beyond a reasonable doubt, that he aided, assisted or abetted him who did it. Affirmed.

6½. If the jury believe from the evidence in the case that the defendant Weston was, on the 26th day of November, A. D. 1883, in the possession of the property on which deceased received the injuries from which he afterwards died, and that he took possession of said property under a claim of

title and a title that he believed to be good, and that he took thereon fire-arms, for the purpose of intimidating any person or persons who might attempt to dispossess him from said premises, and without any design or purpose of taking human life, doing great bodily harm, and that deceased coming on the premises afterwards was suddenly attacked and assaulted by one Bowser, who inflicted injuries upon him from which he afterwards died, he cannot be held responsible, and the jury should acquit the defendant.

This point, as drawn, is affirmed. You will see that it ignores the alleged facts that Bowser was brought there by and was acting for this defendant; that he was armed with a gun and bayonet, also brought there by this defendant; and the further alleged fact that this defendant was present, aiding and abetting in the purpose for which men and arms were brought there by him.

7. No acts of this defendant committed, nor declarations made, after the injury which caused the decedent's death, can render him liable to conviction.

Affirmed, but you can use such acts and declarations if they will assist you in determining any questions involved in your considerations.

8. The defendant, and those with him, having taken possession of the premises, where the deceased was injured, without opposition and peaceably, if their intention only was to hold the same by a show of arms, for intimidation only, and one of their number suddenly, and in a moment of passion or fear superinduced by an attack by a large body of men armed with pick-handles, killed one of the latter, this defendant cannot be convicted, unless beyond all reasonable doubt he aided or assisted in the killing.

Modifying the last line so as to read, "he was present, aiding or abetting in the purpose for which he and those with him were there, and the killing was in pursuance of or an incidental probable consequence of such purpose," the point is affirmed.

9. If the intent of this defendant was only to hold possession of the premises which he had taken without hindrance or opposition, and which he believed he had a right to take and hold, by using only lawful means and using no more force

than was necessary so to do, without intending to use a deadly weapon upon any who might attempt to dispossess him, he would not be responsible for the homicide, although the slayer, unknown to him, might have intended his act. The defendant must have had the same intent as the principal or he must be acquitted.

The point, as drawn, is refused. The first clause is ambiguous, and the last is inaccurate.

10. The jury cannot find from the evidence and circumstances of this case, that the defendant, and those with him, went to or were upon the premises where the killing occurred, with the common design to kill or commit any felony, and therefore, if a homicide occurred, only he who did it and those who aided or abetted him could be held responsible.

Refused, because the facts are for you, and because it excludes a possible part of the case.

11. If the court should refuse the foregoing point, then it is respectfully asked to charge: That unless the jury find from the facts, evidence and circumstances of this case, that the defendant Weston, and those with him, went to or were upon the premises where the killing occurred, with the common design to kill, or to commit some felony, none but he who did the killing or those who aided and abetted him therein can be held responsible.

Refused, because it would require much modification to warrant its affirmance.

12. That loose declarations or admissions of a defendant when under the influence of great excitement should be received by the jury with great care and caution. Such declarations are the weakest and most uncertain evidence admitted by the law, and are not entitled to that respect and confidence which flow from the calm admissions of a party in the presence of a minister of the law.

These views are rather addressed to you than to the court, and are submitted for your consideration.

13. Whilst in a civil issue, involving pecuniary interests, it is the duty of a jury to weigh the evidence and render a verdict according to the weight of the evidence, in a criminal case, involving the life or liberty of a citizen, no mere preponderance or weight of evidence is enough. The evidence must

satisfy the conscience of the jury of the guilt of the defendant beyond all reasonable doubt; or if the jury, after a calm and full review of all the testimony, have a reasonable doubt of the guilt of the defendant, it is their duty to render a verdict of acquittal. Affirmed.

14. Evidence of good character is not a mere make-weight thrown into a case to assist in the production of a result that would happen at all events, but it is positive evidence, and may of itself, by the creation of a reasonable doubt, produce an acquittal. Affirmed.

15. A reasonable doubt arises upon a case which, after comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge against the defendant, or is such want of confidence in the result of thought or investigation as would prevent a reasonable and prudent man from coming to a satisfactory conclusion about an important matter in the business of life. Affirmed.

16. That the burden of proof never shifts but remains on the commonwealth throughout, and if from the evidence a reasonable doubt arises the defendant is entitled to a verdict of acquittal. Affirmed.

17. That the several facts and circumstances relied upon by the commonwealth to convict the defendant must each be proven to be true beyond all reasonable doubt, and if any of them are not so proved it is the duty of the jury to acquit the defendant. Affirmed.

The indictment charges in one count that the defendant Milton Weston, Absalom M. Bowser, and others, murdered Obadiah Haymaker, and under the indictment this defendant could, if the facts warrant, be convicted, whether he be regarded as principal of the first degree, as principal of the second degree, or as accessory before the fact. You have been sworn to try the allegations of this indictment so far only as Milton Weston is concerned.

I assume, for the purpose of this charge, that you will find that Absalom Bowser did, and Milton Weston did not, inflict the wounds which resulted in the death of Obadiah Haymaker. Under the capabilities of this indictment, it will be necessary

for you to try the allegations as to Absalom Bowser, and to determine his guilt or innocence, and if guilty, ascertain the degree of homicide of which Bowser was guilty. In passing upon the guilt or innocence of Bowser, you will do it upon your responsibility as jurors, and upon the evidence given in this trial, as exclusively as though you had not been told by counsel that Bowser had been tried and sentenced. You must make up your minds upon this, as upon every other question involved, for yourselves.

I now read from the charge of Chief Justice Agnew: "At common law, murder is described to be, when a person of sound memory and discretion unlawfully kills any reasonable creature in being, and under the peace of the commonwealth, with malice aforethought, expressed or implied. The distinguishing criterion of murder is malice aforethought, but it is not malice in its ordinary understanding alone, a particular ill-will, a spite or a grudge. Malice is a legal term, implying much more. It comprehends not only a particular ill-will, but every case where there is a wickedness of disposition, hardness of heart, cruelty, recklessness of consequences, and a mind regardless of social duty, although a particular person may not be intended to be injured. Murder, therefore, at common law embraces cases where no intent to kill existed, but where the state or frame of mind termed malice, in its legal sense, prevailed.

"In Pennsylvania, the legislature, considering that there is a manifest difference in the degree of guilt, where a deliberate intention to kill exists, and where none appears, distinguishes murder into two grades: murder of the first and murder of the second degree; and provides that the jury before whom any person indicted for murder should be tried, shall, if they find him guilty thereof, ascertain in their verdict whether it be murder of the first or murder of the second degree. By the act of the 31st of March, 1860, all murder which shall be perpetrated by means of poison, or by lying in wait, or by any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration of, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree."

Many cases have been decided under this clause, in all of which it has been held that the intention to kill is the essence of the offense; therefore, if an intention to kill exists, it is wilful; if this intention be accompanied by such circumstances as evidence a mind fully conscious of its own purpose and design, it is deliberate; and if sufficient time be afforded to enable the mind fully to frame the design to kill, and to select the instrument, or to frame the plan to carry this design into execution, it is premeditated. The law fixes upon no length of time necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury, from all the facts and circumstances in evidence.

A learned judge (Judge Rush, in *Commonwealth v. Richard Smith*) has said: "It is equally true, both in fact and from experience, that no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it." But this expression must be qualified lest it mislead. It is true that such is the swiftness of human thought, that no time is so short in which a wicked man may not form a design to kill, and frame the means of executing his purpose. Yet this suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find the actual intent, that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. If there be time to frame in the mind, fully and consciously, the intention to kill, and to select the weapon or means of death, and to think and know beforehand, though the time be short, the use to be made of it, there is time to deliberate and to premeditate.

The proof of the intention to kill, and of the disposition of mind constituting murder in the first degree, under the act of assembly, lies on the commonwealth. But this proof need not be express or positive. It may be inferred from the circumstances. If, from all the facts attending the killing, the jury can fully, reasonably and satisfactorily infer the existence of the intention to kill, and the malice of heart with which it was

done, they will be warranted in so doing. . . . All murder not of the first degree is necessarily of the second degree, and includes all unlawful killing under circumstances of depravity of heart, and a disposition of mind regardless of social duty; but where no intention to kill exists, or can be reasonably and fully inferred, therefore in all cases of murder, if no intention to kill can be inferred or collected from the circumstances, the verdict must be murder in the second degree.

Manslaughter is defined to be the unlawful killing of another without malice expressed or implied, which may be voluntarily in a sudden heat, or involuntarily, but in the commission of an unlawful act. Voluntary manslaughter often so nearly approaches murder, it is necessary to distinguish it clearly. The difference is this: Manslaughter is never attended by legal malice or depravity of heart, that condition or frame of mind before spoken of exhibiting wickedness of disposition, recklessness of consequences or cruelty, being sometimes a wilful act, as the term voluntary denotes. It is necessary that the circumstances should take away every evidence of cool depravity of heart or wanton cruelty. Therefore, to reduce an intentional blow, stroke or wounding, resulting in death, to voluntary manslaughter, there must be sufficient cause of provocation, and a state of rage or passion, without time to cool, placing the prisoner beyond the control of his reason, and suddenly impelling him to the deed. If any of these be wanting, if there be provocation without passion, or passion without a sufficient cause of provocation, or there be time to cool, and reason has resumed its sway, the killing will be murder. . . . Insulting or scandalous words are not sufficient cause of provocation; nor are actual indignities to the person of a light and trivial kind. Whenever the act evidences a deadly revenge and not the mere heat of blood; whenever it is the result of a devilish disposition and not merely the frenzy of rage, it is not manslaughter, but murder.

"To excuse homicide by the plea of self-defense, it must appear that the slayer had no other possible, or at least probable, means of escaping, and that his act was one of necessity. The act of the slayer must be such as is necessary to protect the person from death or great bodily harm, and must not be entirely disproportioned to the assault made upon him. If the

slayer use a deadly weapon, and under such circumstances as that the slayer must be aware that death will be likely to ensue, the necessity must be great, and must arise from imminent peril of life, or great bodily injury. If there be nothing in the circumstances indicating to the slayer, at the time of his act, that his assailant is about to take his life, or do him great bodily harm, but his object appears to be only to commit an ordinary assault and battery, it will not excuse a man of equal or nearly equal strength, in taking his assailant's life with a deadly weapon."

"The burden lies on the prisoner, in such a case, of proving that there was an actual necessity for taking life, or a seeming one so reasonably apparent and convincing to the slayer as to lead him to believe he could only defend himself in that way."

"When two or more are to be brought to justice for one and the same felony they are considered in the light of, first, principals in the first degree; second, principals in the second degree; third, accessories before the fact, or fourth, accessories after the fact; and in either of these characters they will be felons in consideration of law, for he who takes any part in a felony is in the construction of law a felon, according to the share which he takes in the crime." . . . A principal in the first degree at common law is one who is the actual perpetrator of the act. Principals in the second degree are those who are present, aiding and abetting the commission of the offense. . . . "Merely witnessing a crime, without intervention, does not make a person a party to its commission unless his interference was a duty, and his non-interference was one of the conditions of the commission of the crime." "Hence, although a man be present while a felony is committed, if he take no part in, and do not act in concert with those who committed it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony or apprehend the felon."

It must appear that it was in his mind to encourage, incite, approve of, or in some manner afford aid or consent to the particular act.

"It is not necessary, however, to prove that the party actually aided in the commission of the offense; if he watched

for his companions, in order to prevent surprise, or remained at a convenient distance in order to favor their escape, if necessary, or was in such a situation as to be able readily to come to their assistance, the knowledge of which was calculated to give additional confidence to his companions, in contemplation of law he was aiding and abetting."

"But the act must be the result and in execution of the confederacy; and if the crime is committed by a confederate, as collateral to an escape, or if several are out for the purpose of committing a felony, and, upon an alarm, run different ways, and one of them maim a pursuer to avoid being taken, the others are not to be considered principals in such act."

"It is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus, where A. and B. go out for the purpose of robbing C., and A. in pursuance of the plan; and in execution of the robbery, kills C., then B. is guilty of murder."

"An accessory before the fact is one who, though absent at the commission of the felony, procures, counsels or commands another to commit said felony subsequently perpetrated in consequence of such procuring, counsel or command. To constitute such an accessory it is necessary that he should have been absent at the time when the felony was committed; if he was either actually or constructively present, he is, as has been seen, principal. The accessory is liable for all that ensues as incident to the execution of the unlawful act commanded."

"Having stated the law of the crime, we now note the law of the evidence; and first, it may be stated, as a general rule, that all homicide is presumed to be malicious, that is, murder of some degree, until the contrary appears in evidence. Therefore, the burden of reducing the crime from murder to manslaughter, where it is proved that the prisoner committed the deed, lies on him. He must show all the circumstances of alleviation or excuse upon which he relies to reduce his offense from murder to a milder kind of homicide, unless, indeed, where the facts already in evidence show it. But though the homicide without the circumstances of alleviation or excuse is

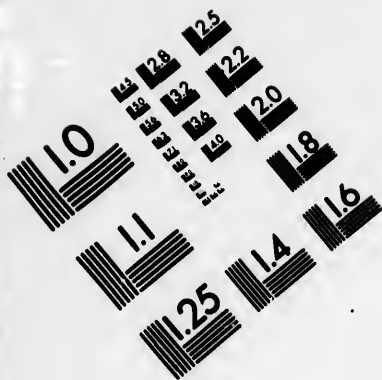
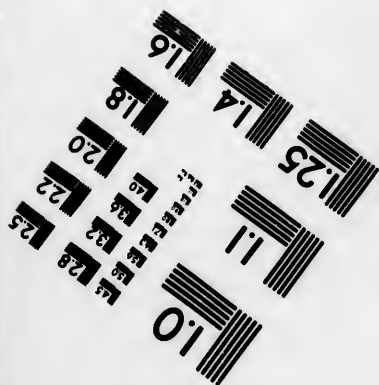
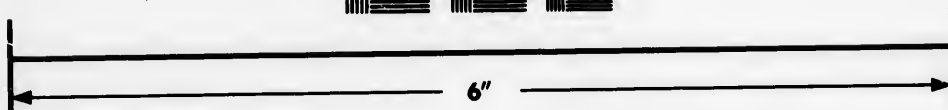
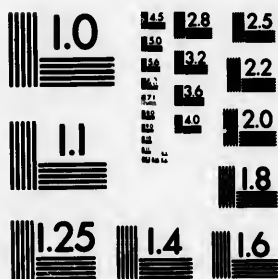


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presumed to be murder, it is not presumed to be murder of the first degree; the presumption against him rises no higher than murder in the second degree, until it is shown by the commonwealth to be murder in the first degree. It therefore lies on the commonwealth to satisfy the jury of those facts and circumstances which indicate the deliberate intention to kill, and to prove depravity of heart and conscious purpose, which constitute, as before stated, the crime of murder in the first degree. In deciding upon the case, or upon any material part of it, the jury must find such beyond any reasonable doubt arising out of the evidence, which prevents them from coming to a satisfactory conclusion, but this doubt must fairly arise out of the evidence and not be merely fancied or conjured up. A jury must not raise a mere fanciful or ingenious doubt to escape the consequence of an unpleasant verdict. It must be an honest doubt, such a difficulty as fairly strikes a conscientious mind and clouds the judgment. If the mind be fairly satisfied of a fact, on the evidence, as much so as would induce a man of reasonable firmness and judgment to take the fact as true, and to act upon it in a matter of importance to himself, it would be sufficient to rest a verdict upon." I also quote on this point from the great Chief Justice Gibson: "Evidence is sufficient when it excludes disbelief: that is, actual and not technical disbelief, for he who is to pass upon the question is not at liberty to disbelieve, as a juror, while he believes as a man; it is enough that his conscience is clear." Or, as another chief justice has put it, "The evidence which produces belief in their minds in one capacity would work the same result in the other. The law says you are the judges of the credibility of the witnesses, and your whole duty in this regard is involved in a correct understanding of what it is to 'judge' of their credibility."

"The presumption of the law is, that every witness, duly sworn or affirmed, speaks the truth until the contrary appears, and that must appear from what you have seen or learned here upon the trial. So it would not be a performance of your duty if you were to disregard the testimony of a witness simply because you have the power to do so. The rejection of his testimony must be the result of careful reflection and of an honest effort to form a correct judgment upon the point."

"The defendant has produced evidence of his general repu-

tation for peace and good conduct among those who have known him during his past life. The effect of such evidence is not confined to doubtful cases. Evidence of good character, when proved to exist, is not a mere make-weight thrown in to assist in the production of a result that would happen at all events; but it is positive evidence. A case may be so made out that no previous character, however good, can make it doubtful; but there may be cases in which evidence given against a person without character would command credence in which a high character would produce a reasonable doubt, or, indeed, actually outweigh the criminating evidence. Such evidence is in truth 'a fact varying greatly in value according to its nature; varying still more in value according to the proof to which it is opposed;' but it may of itself, by the creation in your minds of a reasonable doubt of the existence or truthfulness of the criminating evidence, cause you to acquit the defendant."

The nature of the weapon used by an accused may be important to be considered. The deadliness of the weapon tends to indicate the intention with which it is used. I read the language of the supreme court in a case where a wife was killed by a musket ball.

"If the killing was not accidental, then malice and a design to kill were to be presumed from the use of the deadly weapon; for the law adopts the common and rational belief that a man intends the usual, immediate and natural consequences of his voluntary act. Human reason will not tolerate the denial that a man who intentionally, not accidentally, fires a musket ball through the body of his wife, and thus inflicts a mortal wound, has a heart fatally bent on mischief, and intends to kill. Whatever, therefore, in this case, tended to prove that the killing was not accidental, contributed also to establish that it was wilful, malicious and with a design to kill."

As to the testimony of Hirsh and Keil, you will ascertain whether they were accomplices of the defendant. If they were, the law of their credibility is as follows:

"The degree of credit that should be given to an accomplice is a matter exclusively within the province of the jury. It is competent for them to convict on his uncorroborated testimony, but the source of such evidence is so corrupt that it is

deemed unsafe to rely upon it alone; and hence it is the practice of courts to admonish the jury of the danger and advise against a conviction on the testimony of an accomplice, unless he is corroborated to some extent, especially as to the guilt of the party he accused."

Now let me assist you in applying these principles and rules to the facts as you, whose duty it is, may find them. You will probably first determine of what crime, if any, Absalom Bowser was guilty. You will probably find that the instrument used, a bayonet, an instrument of warfare, is a deadly weapon, and that the injuries inflicted by him were not accidental. If the injuries so inflicted by Bowser killed Obadiah Haymaker, as we have seen, the law presumes the slayer's offense was murder of the second degree.

Do the facts show that the presumption is erroneous? Was Bowser's offense, if any, manslaughter? Was there such provocation given to Bowser as would warrant rage or passion upon his part? Was he impelled in his action by such passion, without time to cool, placing him beyond control of his reason and suddenly impelling him to the deed? If there was no provocation, as has been heretofore indicated, or if he was not under the control of passion, or if his passion was solely the result of his own temper and disposition, his offense, if any, was not manslaughter.

Were the injuries inflicted in self-defense? If you find that Bowser used a deadly weapon, in such manner that death was likely to ensue, as we have seen, the necessity must have been great, and must have arisen from imminent, or to him seemingly imminent, peril of life or of great bodily harm. Had he no other possible, or at least probable, means of escaping and of avoiding the necessity of imperiling the life of Haymaker?

If there be any other facts in evidence which show that the presumption as to murder of the second degree is erroneous, you will apply them.

If you do not find that Bowser was guilty of manslaughter, or acted in self-defense, you will inquire whether he was guilty of murder of the first degree. If you find that Bowser intentionally, not accidentally, used a deadly weapon upon the body of Haymaker and inflicted wounds which caused his

death, malice and design to kill are, as we have seen, to be presumed from such use of the weapon. Was the killing deliberate and premeditated? As we have seen, if sufficient time be afforded to enable the mind fully to frame the design to kill and to select the instrument, the act is premeditated. As I recall the testimony of the surgeon, Bowser inflicted three fatal penetrating wounds and four abrasions slightly penetrating the body. It has been testified that he took the gun and bayonet which he used out of the hand of another, and also that he fired in the direction of the deceased, and that the latter received a grave gun-shot wound. If you believe this evidence, you will determine whether these acts afforded him sufficient time to fully frame the design to kill and to select the instrument with which to execute it, and, in connection with the nature and use made of the instrument, whether he did frame such design.

Considerable evidence has been offered, and a great deal has been said as to possession, and right of possession and property, relative to which I may say that in a possible aspect of this case you may utterly disregard it. If you find from the evidence that no attack or appearance of attack was made by the deceased and those acting with him, upon Bowser and the others at the derrick, and that the latter were not put upon the defensive, it was quite immaterial whether Bowser and the others were there in the exercise of right of possession or not, as their acts were not in defense of such rights. If you find that all that Haymaker and those acting with him did, or gave any indication of doing, was to go and stand upon the pile of boards and remain there, and that those boards were the property of the company with which those men were connected, you will determine the guilt or innocence of Bowser, and of the defendant, without reference to questions of possession of property. If that was the state of facts at the time the deceased was wounded, he and those with him were no more than trespassers; though they had no right on the premises, the use of a deadly weapon upon his person was criminal. What is the testimony as to this matter? As I recall it (you will ascertain the facts for yourselves in all questions), the testimony for the commonwealth is uniform and corroborated by one witness of the defense; that Haymaker and those acting with him came

to the neighborhood of the derrick without haste and without the brandishing of pick-handles; that there was no, or that the witnesses saw no brandishing of pick-handles by those on the board pile, and that no attack or appearance of attack was made by the latter. Of the witnesses for the commonwealth there was a farmer, a mail boy, and three young men, and possibly others who seem to have had no connection with the claimants of the well. The only diverse testimony that I remember was that of Mr. Meehling, and a young man, who both were at a distance, according to Mr. Meehling, of about one thousand feet. You will determine the facts.

I instruct you further that the title and possession of this defendant to the well was not such as would excuse him, or those with him, in taking in their defense the life of an assailant, though the latter might with others have come with the manifested purpose of expelling by force those in possession. Rather than this, he and they would have to submit to dispossession and to seek redress through the law. If you find that Bowser was not guilty of any degree of homicide, you will acquit this defendant. If you find him guilty of any offense under this indictment, you will consider the relation under the law and the facts of this defendant to the offense of Bowser. Was the defendant Weston present, aiding and abetting (as you have learned, the law interprets these words) in the crime, if any, committed by Bowser? Was he in such a situation as to be readily able to come to Bowser's assistance, if useful?

[As you have seen, in order that you may find this defendant guilty of being present, aiding and abetting, it is not needful that it should appear that he was actually at hand, that he personally assisted, that he knew beforehand of Bowser's act, or that he consented to it beforehand. It will be sufficient that he was near enough to readily assist in furthering the purpose for which he and those with him were there, and that the killing was an incidental and probable consequence of the execution of that purpose, and that the killing appeared at that moment to Bowser to be expedient for that purpose. What was that purpose? Was it, as I understand, to be the claim on the part of the defendant to occupy the well, if it could be done without a breach of the peace, and to hold it by using only lawful means, without intent to use a deadly weapon, but

merely to employ such weapons for purposes of intimidation?]

Or was that purpose to dispossess those who at the time were occupying the well to provide guns, bayonets and ammunition, and to take them upon the premises, and to hold the well, by their use, if necessary? You will determine this question in the light of all the evidence, the providing of guns, of balls and cartridges, and of bayonets, of the loading of the guns with missiles, of the using, as testified, of the guns as clubs against the deceased and others when they approached unarmed, and such other facts as may aid you in your inquiring as to your respective theories on this point.

If you find that this defendant was present, aiding and abetting in, and that the act of Bowser was done in pursuance of the common purpose and was an incidental and probable consequence of the execution of the purpose for which Bowser was there, this defendant was a principal in the killing by Bowser, though it was not a part of the common purpose.

But even if you so find, it seems to me that this defendant's crime is not necessarily of the same grade as that of Bowser. If you find the facts so to be, and at the same time, though this defendant may have brought Bowser there, that Bowser's act was influenced by brutal passion, unsuspected by this defendant, it seems to me, although he could not be guiltless, the law would regard his criminality as possibly of a less grade than that of Bowser.

Did the defendant, though absent at the killing of the deceased, procure, counsel or command the act of Bowser, perpetrated in consequence of such procuring, counsel or command?

The evidence does not give a direct answer to this question, and you must determine it by inference from the evidence. If you can fully, reasonably and satisfactorily find from all the evidence that such was the case, you will be warranted in so doing. If you so find, and that the killing ensued in the execution of the unlawful act, procured, counseled or commanded by this defendant, he would be liable therefor.

Counsel have pressed upon your attention, on the one hand, considerations touching the defendant, and on the other of alleged duty to the community and to the law. You will give these and all other considerations their due weight. You can-

not fully perform your duty if you shall consider only the defendant and the consequences to him. In my judgment, you can best discharge it if you will keep constantly before you that your duty is simply to try a question of fact, and to give a true verdict according to the evidence. If you will exclude from your mind every consideration that does not aid you in ascertaining that verdict, you will therein be faithfully performing your obligations to the defendant, to the law, and to yourselves.

The jury returned a verdict of guilty of voluntary manslaughter. A motion in arrest of judgment was made, which was overruled, whereupon the defendant was sentenced to pay a fine of six cents and the costs of prosecution, and undergo an imprisonment in the western penitentiary for the period of five years.

The defendant took this writ, assigning for error the manner of answering the defendant's first point (first assignment), the answers to the eighth, ninth, eleventh and twelfth points (second, third, fourth and fifth assignments); that portion of the charge above quoted which is inclosed in brackets (sixth assignment); the overruling of the challenges to the jurors Burns, Tyle, Morris, Weldon, McElhaney and McClelland (seventh, eighth, ninth, tenth, eleventh and twelfth assignments); and the exclusion of the testimony of the witness Mechlin, as to the advice given by counsel to the defendant (thirteenth assignment).

Thomas M. Marshall, with him *John S. Robb*, *Wm. Reardon* and *C. A. O'Brien*, for plaintiff in error.⁵

W. McCullough, acting district attorney, and *W. D. Moore*, for the commonwealth.

GREEN, J. There is no merit whatever in the first assignment of error.

The modification of the defendant's eighth point covered by the second assignment was entirely correct. The point limited the prisoner's responsibility to a direct aiding or assisting in the killing. The answer merely modified this by extending the responsibility to aiding or abetting in the common purpose of all, providing the killing was in pursuance of, or an incidental,

probable consequence of, such purpose. We see no error in this. If there was a common purpose to kill, and the prisoner was present, aiding or abetting in that purpose, of course he was liable for the act of one of the party he was aiding in carrying out that purpose. Equally true is it that he would be so liable if the killing was a probable consequence of the common purpose. Thus it is said in 1 Whart. Crim. Law, § 220 (8th ed.): "It is not necessary that the crime should be part of the original design; it is enough if it be one of the incidental, probable consequences of the execution of that design, and should appear at the moment to one of the participants to be expedient for the common purpose. Thus, where A. and B. go out for the purpose of robbing C., and A., in pursuance of the plan, and in execution of the robbery, kills C., B. is guilty of murder." The intent stated in the point, to hold possession by a show of arms for intimidation only, was itself unlawful, and draws to itself the consequences of acts done in carrying it into execution.

The fault of the first clause of the defendant's ninth point is that it does not cover all the circumstances which are essential to the validity of its conclusion. The conclusion is absolute that there would be no responsibility of the defendant, a confederate, although the slayer intended his act. The only premise given for the conclusion is that the defendant intended to hold possession by lawful means and did not intend to use a deadly weapon upon any who might attempt to dispossess him. But the point includes as part of the intent the determination to hold possession by using as much force as was necessary, and the conclusion ignores the effect of an actual use of arms by the whole party, including the defendant, in holding possession, and therefore omits a circumstance which may be quite material to its validity. It was doubtless for reasons like this that the learned judge said the first clause was ambiguous. The last clause of the point is not technically sound and justifies the remark of the court.

The fourth assignment is not pressed.

As to the fifth, it may be said that it is put rather too strongly for an absolute affirmance, but the court practically affirmed it by referring it to the jury as an expression of views more proper for them than for the court. The point related

to the effect to be attached to loose declarations. This, of course, was for the jury to consider, so far as the application of the doctrine was concerned, and it was turned over to them without denial or qualification. Properly, it should have been somewhat qualified, but the omission to express the qualification is no ground for reversal when it gave the defendant the full equivalent of an affirmance.

The sixth assignment is disposed of by the answer to the second. We see no error in the part of the charge covered by this assignment. Surely, if the killing was an incidental and a probable consequence of the execution of the common purpose, and the defendant was participating in the acts which were being done in the execution of that purpose, he was responsible. Whether he was so participating was carefully left to the jury.

The seventh to twelfth assignments, both inclusive, cover the rejection of the defendant's challenges to six of the jurors. A careful examination of the testimony of the jurors convinces us that the challenges were properly overruled under the decision in the case of *Allison v. Com.*, 3 Out., 17. All of the jurors denied that they had formed or expressed any fixed opinion as to the guilt or innocence of the defendant. None of them had read or heard the testimony taken on a former trial, because there had been no former trial of this defendant. There had been a preliminary hearing as to the facts of the occurrence which resulted in the death of Haymaker, and there had been a trial of one of the persons implicated named Bowser. Some of the jurors had read the newspaper reports of the hearing, and some had read parts of the testimony, as published in the newspapers, taken on the trial of Bowser. No one said he had read the whole of the testimony actually delivered on the Bowser trial. Even if a reading of the whole of the testimony in the *Bowser Case* would have disqualified the juror, the evidence does not come up to that test, and therefore was not sufficient as a cause of challenge. But it is very evident that *Bowser's Case* and the defendant's case are not the same. One might be guilty and the other innocent. The testimony in *Bowser's Case* might disclose little or nothing of the facts necessary to convict Weston, and therefore an opinion that Bowser was guilty, upon the evidence given to

implicate him, would not at all necessitate an opinion as to Weston's guilt. As every one of the jurors denied the formation of any fixed opinion as to Weston's guilt, there was nothing to disqualify any of them under our decision in *Allison's Case*. These assignments are not sustained.

As to the thirteenth assignment, it is only necessary to say that if counsel had advised the defendant that he might with impunity do every one of the acts necessary to make out his guilt, the fact of such advice would have been no defense whatever to him. Of course, if he was advised that he might do some of these acts without criminality, it could have no higher effect. Whatever legal rights the defendant might have as to property claimed by him, he could set up and avail himself of, whether he had been advised of them or not. The giving of the advice neither increases nor diminishes his criminality in any degree, and therefore it was irrelevant.

The judgment is affirmed, and it is ordered that the record be remitted to the court of oyer and terminer of Allegheny county for the purpose of execution.

NOTE.—See *The Queen v. Cox and Railton*, 5 Am. Cr. R., 140, in regard to privileged communications, advice of counsel, etc.

DACEY v. THE PEOPLE.

(110 Ill., 555.)

MURDER: *Continuance — Affidavits — Cumulative evidence — Insanity — Instructions — Omitting to instruct as to degree — Credibility of witness.*

1. CONTINUANCE—WHAT AFFIDAVIT FOR, MUST SHOW.—It is necessary that a party applying for a continuance should show by affidavit how he would be injured by a denial of the motion, *e. g.*, by mentioning some witness who cannot be brought in now, but can be brought into court at a future term; or, if the continuance is asked on the ground that counsel have been employed only a short time previous, it should be stated that by reason of that fact counsel will be unable fairly to present the case.
2. SAME—AS AFFIDAVITS FOR ARE GENERALLY TAKEN AS TRUE, THEY MUST BE CONSISTENT.—For the purpose of deciding a motion for a continuance the affidavits must generally be taken to be true; but when several affidavits are filed for the purpose of obtaining a continuance,

which are inconsistent with each other, the court is not bound to treat both as true. It is presumed that in making the showing for a continuance the defendant will make the strongest possible statement in his own favor that the facts will warrant; and so far as the showing is equivocal or uncertain, the intendments must be taken against it.

3. CUMULATIVE EVIDENCE AS GROUND FOR CONTINUANCE.—Continuances will not be granted for the purpose of enabling a party to obtain testimony unless some necessity for such testimony is shown. Evidence that is merely cumulative is not so necessary as to be ground for granting a continuance to enable a party to procure it, except in special circumstances, *e. g.*, a conflict of evidence on the point to prove which it is offered.
4. WHAT AFFIDAVIT MUST STATE AS TO PROCURING ATTENDANCE OF NON-RESIDENT WITNESS.—Affidavits for a continuance which state that the party believes he can procure the attendance of certain witnesses, and expects to prove certain propositions by them, must also state the grounds of such expectation. Without this they are insufficient. Where witnesses are beyond the limits of the state, it is necessary to state the grounds on which the expectation is based that their attendance can be procured. And further, he must have used such reasonable means as are within his power to procure their attendance and testimony. But where the witness lives within the state, and is amenable to the process of the court, the statement of expectation that their attendance can be had is sufficient.
5. INSANITY AS A DEFENSE — DEFINITION — PRESUMPTION OF SANITY — REASONABLE DOUBT.—The law presumes every man to be sane until insanity is made to appear. To make a case of insanity it must "appear" that, at the time of committing the acts charged, the accused was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, by overriding his reason and judgment. The legal presumption of sanity may be overcome by evidence tending to prove insanity, sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable.¹
6. SINGLE INSTRUCTION NEED NOT EMBODY WHOLE LAW OF CASE — DEGREE OF PROOF.—It is impossible to embody in a single instruction all the law relative to the subject of a case; *e. g.*, relative to the nature of the case to be made out, and the degree of proof necessary to sustain it. It will be sufficient if there is nothing in the particular instruction inconsistent with the principle pertaining thereto, and other instructions, in the series given, correctly announce the rule.
7. FORM OF VERDICT FOR LESSER OFFENSE — DEFENDANT MUST ASK FOR.—If it be desired by the defendant accused of a crime that an instruction of the form of verdict for the lesser offense be given, it is his duty to prepare and ask for such an instruction; and, failing to avail himself of that right, he is in no position to complain.
8. MURDER — MANSLAUGHTER — EVIDENCE REVIEWED TO SHOW ELEMENTS OF MANSLAUGHTER WANTING.—The evidence of the case, which was

¹ See note.

on an indictment for murder, is reviewed, and held to be wanting in those elements which constitute a case of manslaughter; *e. g.*, sudden impulse of passion.

9. **FALSUS IN UNO, FALSUS IN OMNIBUS — RULE CONFINED TO MATERIAL MATTER.**—The principle that, if the jury believe from the evidence that a witness has wilfully sworn falsely in the case, they are at liberty to disregard his testimony except so far as corroborated by other credible evidence in the case, is subject to the essential qualification that such knowingly false testimony must have been to matters material to the issue. But an error of instructions, by omitting to state that the false oath must be on a material point, is held not to have been injurious to the defendant where the instructions, as a whole, give the case fairly to the jury.

Writ of error to the Circuit Court of McHenry County, the Hon. Isaac G. Wilson, Judge, presiding.

T. D. & E. D. Murphy, for the plaintiff in error.

Julius S. Grinnell and Messrs. Mills & Ingham, for defendant in error.

SHORE, J. The indictment in this case was returned into the criminal court of Cook county, May 31, 1884. An arraignment of defendant was had June 13th following, and on the 23d of the same month a motion for change of venue was entered by defendant, and such proceedings were had that on the 5th of July, 1884, the venue of the cause was changed to McHenry county. The circuit court of McHenry county commenced the fourth Monday in September, and on the 24th of September, being one of the days of that term, the defendant entered his motion for continuance, supported by his own affidavit, and the affidavit of his brother, Patrick Dacey. On the same day this motion was overruled by the court, and on the 29th of September the defendant was put upon trial, which resulted, on the 3d of October, in a verdict of guilty of murder, and fixing the penalty at death. Motion for new trial by defendant was overruled by the court, and judgment entered on the verdict, sentencing the defendant to be hanged by the sheriff of McHenry county, November 21, 1884. Exceptions were duly taken to the various rulings of the circuit court, and the defendant, James Dacey, prosecuted this writ of error to the circuit court of McHenry county to reverse the judgment so entered. The first error assigned is the overruling of the motion by defendant for a continuance.

It will be unnecessary to quote the affidavits except so far as they relate to the two witnesses, Ellen and Michael Farrell, without whose evidence it is alleged the defendant could not safely proceed to trial. The other portions of the affidavit of plaintiff in error state, in substance, that plaintiff in error was arrested on the 13th day of May, 1884, and has since been in close confinement; that very soon after his arrest a lawyer of high standing and reputation was retained by friends of the accused to prepare and conduct his defense, and to whom large sums of money were paid; that he and his friends relied upon said attorney, who represented at various times that the case was being prepared; that he knew no better until the 24th day of August, 1884, when his case was abandoned by his attorney, who had failed to make any preparation thereof whatever; that he was refused permission by the jailer to communicate with his friends after the 24th of August until about a week before his removal from the Cook county jail to McHenry county; that his attorneys, then in charge of his case, had been employed only a few days; that his only friends who were able to assist him resided in Buffalo, New York; "that as soon as he could, situated as he was, he communicated with and informed his friends in Buffalo, and as soon as they possibly could they came on, reaching Woodstock last Saturday morning, when the present counsel was employed." It is noticeable that nowhere in the affidavits filed is it even inferentially stated that the counsel then defending were, because of their recent employment or for other cause, unable to fairly present the defendant's case. The affidavits are wholly silent upon that subject. And it will also be observed that there is no statement in the affidavits that there are persons who may have known the defendant during the years he resided in Chicago, from 1879 to A. D. 1884, whose names or residences were then unknown, or who had not been found; that is, that farther time for preparation, if allowed, would enable the defense to produce a single witness who had known the defendant and his condition during the five years preceding the homicide that they did not then know of and were able to produce. True, Patrick Dacey in his affidavit says "he believes there are two respectable physicians in the city of Chicago who have, since defendant has been a resident of said Chicago, treated him, and

know him to be an insane man, but whose names this affiant *is this moment unable to give,*" but if permitted time believes he can produce them. At "the moment" he was unable to give the names, but there is no statement that the names were unknown to the defense, or that they could not be produced at that term of court as well as at any subsequent one. Indeed, it is perfectly clear from the record that they were in fact in attendance on that court, and testified in the case. The testimony of Patrick Dacey when on the stand discloses that Dr. Bluthardt, county physician of Cook county, and his assistant, were the physicians who attended upon his brother James in Chicago, both of whom testified upon the trial of the cause.

The defendant in his affidavit sets forth what he expects to prove by said Farrells, and says that their testimony, with such testimony as he is able to provide from Chicago and the scene of the tragedy, will satisfy any unprejudiced jury of his innocence. The names of Michael Leyden, John O'Brien, Benjamin Price, "and others" of Chicago, are given as such witnesses. As already said, there is no reason given or facts shown why he is not prepared for trial, so far as witnesses who had known him for the five years preceding the homicide, or so far as the ability of his counsel was concerned, or on account of any other matter, except the attendance of said witnesses Farrells, as he could ever hope to be.

Upon a showing that for want of time counsel did not have the cause properly in hand, or that witnesses were not in attendance who could be found if more time was given, or the cause was not ready for trial for want of opportunity for preparation for any cause shown to exist, the court would undoubtedly, in the exercise of a wise discretion, have postponed the trial until a later day in the term, or until another term, if apparently necessary to do so, and such action would not have occasioned any just criticism. But it is insisted that this being the first application by defendant for continuance, and the defendant, as shown, having been abandoned by his counsel, and from the 24th of August until some time in September having been refused permission to communicate with his friends, upon consideration of these facts a continuance should have been granted. It is the right of every citizen, when indicted for an offense, to have a fair and impartial trial, and compulsory process to compel the attendance of

his witnesses, and that involves, as a matter of course, the time reasonably necessary to prepare for trial, and to find and produce testimony in his defense. It is not, however, a matter of which the defendant can complain that the trial is speedy, or occurs at the first term, or however speedily after the alleged commission of the offense, if he has had time for preparation and is ready for his defense. The affidavit filed, as already seen, presented no facts which, in the exercise of reasonable discretion by the court, would have warranted a continuance of the cause, outside of the alleged absence of the witnesses Michael and Ellen Farrell.

We will next consider the application with reference to those two witnesses. The affidavit of defendant states:

"That he expects to be able to prove by Michael Farrell and Ellen Farrell, of the city of Buffalo, New York, that he [this defendant] is a person of unsound and insane mind, and has been for the ten years last past; that his abnormal mental condition at the time of said alleged murder was the prime cause of any act of his which is the foundation of the complaint by the people in [this] case; that he knows of no other witness or witnesses by whom he can prove such fact of insanity prior to his residence in Chicago, which has been for the last five years; that, in order to establish his condition at the time of the alleged murder as to sanity or insanity, it will be necessary to show his condition in prior years, which he can do only by procuring the attendance of said witnesses Michael and Ellen Farrell, from Buffalo, aforesaid, which he believes he can do by the next term of this court, and that this application is not made for delay, but that justice may be done; . . . that he verily believes he can prove by said Michael Farrell and Ellen Farrell that for the ten years last past he [this defendant] has been of unsound and insane mind — subject to insane delusions — and that uniformly, when under the influence of excitement from any cause, his reason would leave him, and he would become the victim of all sorts of insane delusions, and by the aid of their testimony, with such testimony as he is able to provide from Chicago and the scene of the tragedy which resulted in the alleged murder, he will be able to satisfy any unprejudiced jury of the fact of his insanity at the time of said homicide, and that in fact and in law he is not guilty in man-

ner and form as charged in the indictment; that he expects to be able to prove by Michael Leyden, John O'Brien, Benj. Price, and others, of Chicago, Ill., who have known defendant since his residence [there,] such facts and circumstances as, when taken in connection with the testimony of said Michael Farrell and Ellen Farrell, of Buffalo, as aforesaid, will make a complete and legal defense against said indictment."

The defendant, in further support of his motion for continuance, filed the affidavit of his brother, Patrick Dacey, as follows:

"That he is a brother of defendant, resides in Buffalo, and has taken a deep interest in his brother's fate. That soon after the alleged murder he was informed that Mr. Augustus Van Buren had been employed to defend his brother, and the preparation of the case confided to him, and that he was making every necessary preparation. That he knew no better until two weeks ago. That, immediately after learning the course pursued by said attorney, he received an injury that prevented his traveling until within a week. That as soon as he could he came to Chicago, and reached Woodstock the evening of the 23d inst. That he finds his brother's defense has been entirely neglected and unprepared, and that he cannot safely proceed to trial at the present term of this court. That for ten years last prior to the year 1879 he (said defendant) and affiant boarded at the same house in the city of Buffalo, N. Y. That during that time he (said defendant) was afflicted at certain periods, running through the whole time, from twice to three times a year, of being thoroughly insane and crazy, and when in these insane moods he was cross and dangerous. Many times during that period this affiant attended him nights and took care of him, and got him doctored and cured for the time being, the doctors claiming that the trouble was in his head, as this affiant has no doubt is the case. That Michael and Ellen Farrell, of Buffalo, are near relatives of said defendant, and know all about his mental malady better than any one else; and this affiant verily believes, if permitted to procure their attendance, the defendant can abundantly establish the fact of his insanity for the past fifteen years. And this affiant further states that, as he believes, there were two respectable physicians in the city of Chicago who have, since

defendant has been a resident of said Chicago, treated him, and know him to be an insane man, but whose names this affiant is this moment unable to give, but, as he verily believes, if permitted time to do so, he can find and produce them by the next term of this court. This affiant expects and believes, if allowed time until the next term, he can prove enough by said Michael and Ellen Farrell, which, taken with such other testimony as he has got in Chicago, to make a good legal defense of said defendant on the trial of said cause."

We have thus given all of the affidavit of Patrick Dacey filed in support of said motion, and all of the affidavit of the defendant in any way relating to or touching upon the materiality of the evidence of the Farrells or other witnesses, and of the reasons for expecting that they would be present at some future term of said court, and of the efforts that in fact were made by the defendant, or any one for him, to procure their attendance. It is insisted by counsel that these affidavits must, for the purposes of the motion for continuance, be taken as absolutely true. As applied to these affidavits, this is stating the rule too broadly. As a rule, the statements of fact contained in the affidavits for continuance must, for the purposes of the motion, be taken as true; but here the defendant, by filing the affidavit of his brother Patrick, gave it credit, and thereby authorized the court to give it the same credence as his own; and if the statements therein are inconsistent with that made by the defendant, the court was not bound to treat both as true. It is presumed that, in making the showing for a continuance, the defendant will make the strongest possible statement in his own favor that the facts will warrant; and, so far as the showing made is equivocal or uncertain, the inferences must be taken against it. *Steele v. The People*, 45 Ill., 155; *State v. Eisenmeyer*, 94 id., 96. Here the defendant swears, in his affidavit, "that he knows of no other witness or witnesses by whom he can prove such fact of insanity prior to his residence in Chicago" except said Farrells; and, again, that he can only show his condition in such prior years by procuring the attendance of said Michael and Ellen Farrell; and at the same time he files the affidavit of the man who boarded in the same house with him for ten years prior to his coming to Chicago, who tended on him during the nights and days.

and who swears to his insanity at intervals during the entire period covered by the proposed evidence of the absent witnesses. Who would be so well qualified to testify to his condition during the ten years prior to 1879 as the man who had lived in the same house with him continuously for the whole of that period, who had watched with him at night, and tended, nursed and restrained him in his violence, called the doctors, listened to their diagnosis, and was enabled to testify to them? There is no pretense that the Farrells have known anything of the defendant's mental condition since his coming to Chicago in 1879. Patrick Dacey, whose affidavit was filed by defendant,—sworn to on the same day as his own,—was in actual attendance on the court when the motion was pending, and competent to testify in defendant's behalf; and no reason is given, or attempted to be shown in the affidavit, why his testimony would not be competent and sufficient to prove every fact sought to be proved by the Farrells.

Continuances ought always to be granted when, from the showing, justice requires it to be done, and to enable a defendant to procure all legal and competent evidence necessary for the fair presentation of his case, if he has used due diligence to obtain the same. These technical objections should not ordinarily prevent the granting of the motion for continuance, if it is necessary to the proper presentation of the defendant's case. But continuances will not be granted unless it is shown that there is some necessity for the production of the proposed testimony. Hence, in affidavits for a continuance, it is the uniform practice for the party applying for the continuance to state that he has no other witness by whom he can establish the same fact. Continuances will not be allowed to enable the party to produce evidence that is merely cumulative, unless there is some necessity shown therefor;—such as that there will be a conflict in the evidence in reference to the particular matter in regard to which the absent witness is expected to testify. *Shook v. Thomas*, 21 Ill., 87.

Here the testimony of the Farrells, if produced, would be cumulative merely to testimony of Patrick Dacey, and there is no statement that there was any apprehended conflict in the testimony as to the mental condition of defendant prior to his coming to Chicago in 1879, or other reason stated why there

would be any necessity for testimony additional to that already affirmatively shown by the affidavits to be in the power of the defendant to produce at the trial. As a matter of fact, there was no conflict in the evidence as to the mental *status* of the defendant prior to A. D. 1879, and while he resided in Buffalo, which covered the whole time in which his insanity was sought to be shown by the Farrells. It might and undoubtedly would be much more satisfactory to prove the fact of his insanity in prior years by a number of witnesses; but insanity is a fact to be proved as any other fact; and if it became or was thought to be material to accumulate testimony as to that matter, it could readily have been shown by the affidavits. From the affidavits the court could not say that there would be any attempt to prove his sanity at any time, or that any conflict would arise upon that subject at any time in the life of the accused, either before or after he came to Chicago.

Again, these affidavits were fatally defective under the rule announced by this court in *Eubanks v. The People*, 41 Ill., 487; *Petteet v. The People*, 70 id., 171; *Wilhelm v. The People*, 72 id., 468. The affidavits state that he expects to prove, etc., by the Farrells, at the next term of the circuit court, and that he believes he can procure their attendance at such next term of said court; but they wholly fail to show or set forth the grounds of such belief or expectation. The object of granting the continuance is that justice may be done by permitting the defendant to procure his testimony; and, unless the witnesses could be produced at the time to which the case was continued, the continuance would result in delay in the administration of the law, and subserve no good end.

In *Eubanks' Case*, *supra*, it was said by this court, in passing upon the sufficiency of an affidavit for continuance in that case:

"Nor does it [the affidavit for continuance] state when, if ever, these persons expected to return to this state, or that he [the defendant] had any expectation or information on the subject. Had the witnesses been residents of the state, and amenable to the process of the court, that statement would no doubt have been sufficient, [that he expected to procure the testimony by the next term, etc.,] as the court could then have seen how the testimony could have been procured at the next

term; but it is otherwise when a witness is beyond the limits of the state, and in such cases the party applying for a continuance should state the grounds of his expectation, so that the court may determine whether it is reasonable; and when stated, if it seems probable that the evidence can be obtained, and if material, the motion should be allowed. But if, when the grounds of the expectation are disclosed, it appears there is no reasonable probability that the attendance of the witnesses can be had, the motion should be refused."

In the case of *Wilhelm v. The People*, cited, the court held that, as the absent witness was non-resident of the state, it was indispensable that the grounds of the expectation of the attendance of the witness should be set forth in the affidavit for continuance. And so, in the case of *Perteet v. The People*, the court say:

"No sufficient facts are set out in the affidavit by which the court could see that the evidence of Harvey would ever be obtained, which is necessary in a criminal case, when the witness is out of the state, and cannot be reached by the process of the court."

The rule announced, that, where the witness is a non-resident, the statement of the grounds of the expectation or belief of his attendance at a future term of the court is necessary and indispensable to the sufficiency of an affidavit for continuance on account of the absence of such witness, in a criminal case, is reasonable, and tends to promote the proper and efficient administration of the criminal laws.

Again, while no considerable degree of diligence could be required of the defendant under the circumstances shown by these affidavits, yet a defendant is required, at all times, to use due diligence to prepare his cause for trial. Taking the affidavits the most strongly in favor of the defendant, it appears that a week before his removal to McHenry county he was at perfect liberty to communicate with his friends, and did so. He was removed from the Cook county jail to Woodstock, the county seat of McHenry county, on the 19th of September; so that from the 12th day of September until the 24th, when the affidavit was filed, he could have communicated with the witnesses Ellen and Michael Farrell, and procured their attendance at the September term, 1884, if they

were willing to attend. There is no pretense that he did this, or did anything towards endeavoring to secure their testimony. No reason is shown why they could not or would not attend at that term if they had been so requested, or why they would not as readily attend then as at any subsequent time. When a party desires the testimony of a witness who is a non-resident of the state, and therefore not amenable to the process of the courts, he cannot rely upon such non-residence of his witness as a cause for a continuance, unless he has used such reasonable means as are within his power, in the time elapsing, to procure the testimony. If there is time within which to do so, and the residence is known, it is his duty to ascertain if the attendance of the witness can be procured at the first term of the court, and, failing to do so, he cannot be held to have used due diligence. Here twelve days intervened after all restrictions were removed from defendant's communication with his friends, before the affidavits for continuance were filed, and no request to these absent witnesses is shown. It is shown that they were "near relatives of the defendant," and no reason is shown why they could not attend at that time. The presumption is just as strong that they would, if asked to do so, have attended at the September term of that court as at any succeeding term. After the motion for continuance was overruled five full days elapsed before the trial commenced, and eight days before the case went to the jury,—ample time to have secured the attendance of these witnesses. Two days at most would be all that would be required to enable them to reach the place of trial if they were willing to attend, and no unwillingness on their part is suggested, nor any request made for them to do so shown. We are of opinion that it was not error for the circuit court to overrule the motion for continuance.

It is also insisted that the court erred in giving the third, fourth and fifth instructions given at the instance of the people. So much of the people's third instruction as will be necessary to show the criticism upon it is as follows:

"The court instructs the jury, as a matter of law, that the law presumes every man to be sane until the contrary is shown; and when insanity is set up as a defense by a person accused of crime, then, before the jury can acquit the accused

on the ground of insanity, it must appear from the evidence in the case that, at the time of the commission of the crime, the accused was not of sound mind, but affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, by overriding his reason and judgment," etc.

It is obvious that the purpose of this instruction was to define and give to the jury the legal rule as to that degree of insanity which would relieve the defendant from criminal responsibility. It was the duty of the court to define and prescribe the rule by which the jury must be governed in determining whether the defendant was accountable, under the law, criminally or not. No criticism is made of this instruction in the respect indicated, or that it does not prescribe the proper rule to be applied by the jury in determining whether the defendant, at the time of the commission of the alleged criminal act, was afflicted with that insanity which would, under the law, shield him from legal accountability and punishment. Nor will it be necessary to discuss here the law relating to this important and interesting subject. It is sufficient to say that the instruction in that respect is in entire harmony with the rule announced by this court in *Hopps v. The People*, 31 Ill., 391, and *Chase v. The People*, 40 id., 352. We regard the principles adopted as wise, humane and reasonable, protecting alike, as best can be done with our imperfect knowledge of mental diseases, the great interests of society, and this most unfortunate class of persons when arraigned for the commission of crime.

It is objected, however, to this instruction that by it the jury are told that, before they can acquit on the ground of insanity, it must appear from the evidence in the case that the defendant, at the time of the homicide, was not of sound mind, etc., and that thereby was imposed upon the defendant the burden of proving his insanity by a preponderance of the evidence. We do not so understand the instruction. Soundness of mind is presumed if the defendant "is not an idiot, lunatic, nor affected with insanity." The first proposition of the instruction, "that the law presumes every man to be sane until the contrary is shown," is fundamental, and unquestioned as being a sound proposition of law. This instruction defined the mental condition which will be held to exculpate the party charged

from punishment for an act which would otherwise be criminal, and told the jury that such condition must appear from the evidence before they would be warranted in acquitting for that reason. To what extent it must appear is not stated;— whether beyond a reasonable doubt, by a preponderance of the evidence, or to an extent only sufficient to raise a reasonable doubt of sanity, the instruction does not assume to determine. The presumption of sanity inheres at every stage of the trial until insanity is made to appear by the evidence. The law in this state undoubtedly is that this legal presumption may be overcome by evidence tending to prove insanity of the accused which is sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. When that is done, the presumption of sanity ceases, and the burden shifts to the prosecution, and it is then required to prove his sanity as an element necessary to constitute crime beyond a reasonable doubt. It is accurate to say that when the defense of insanity is interposed, and evidence offered tending to sustain it, if the jury, after considering all of the evidence, entertain a reasonable doubt of the sanity of the accused at the time of the commission of the alleged offense, he must be acquitted. It is found in practice impossible, however, to embody in a single instruction every principle of law relating to the subject under consideration, and it is not necessary that the law in regard to the measure of proof required should be incorporated in each instruction. It will be sufficient if there is nothing in the particular instruction inconsistent with the principle pertaining thereto, and other instructions, in the series given, correctly announce the rule.

In this case the jury were fully instructed as to their duty to acquit if they entertained a reasonable doubt of the defendant's guilt. In the second instruction on behalf of the people the rule of law upon this subject was given, and by the third instruction for the defendant the jury were told:

“The jury are further instructed that mere probabilities are not sufficient to warrant a conviction; nor is it sufficient that the great weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that, upon the doctrine of chances, it is more probable that the defendant is guilty than innocent. To warrant a conviction of the de-

defendant he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent when all the evidence in the case is considered together; and if the prosecution has failed to make such proof, the jury should find the defendant not guilty."

The second, third, fifth and sixth instructions for the defendant fully laid down and elaborately stated the law in regard to the presumption of innocence of the accused, and stated the rule fully and broadly that the jury must acquit if they entertained any reasonable doubt of his guilt. The seventh, eighth, tenth and twelfth instructions given at his instance were as follows:

"That it is true the law presumes every man to be sane and responsible for his acts until the contrary appears from evidence. Still, if there is evidence in the case tending to rebut the presumption, sufficient to raise a reasonable doubt upon the issue of sanity, then the jury will find the prisoner not guilty.

"That to warrant a conviction in this case it is incumbent on the people to establish by evidence, to the satisfaction of the jury, beyond all reasonable doubt, the existence of every element necessary to constitute the crime charged. And if, after a careful and impartial examination of all the evidence in the case bearing upon the question of sanity or insanity, the jury entertain any reasonable doubt of the sanity of the defendant at the time of the alleged offense, they should give the defendant the benefit of that doubt, and acquit him.

"The jury are further instructed, as a matter of law in this case, that if, from a careful consideration of the facts and circumstances shown in this case by the evidence, you believe that the defendant Dacey was insane and of unsound mind on the 13th day of May last, as late as 12 o'clock on that day, or thereabouts, then the presumption of law is that that condition of mind continued up until after the shooting between 10 and 11 o'clock of that evening, as complained of in the indictment, unless you shall further believe from the evidence in the case, beyond all reasonable doubt, that he recovered from such insane condition of mind prior to said shooting.

"The court instructs the jury, as a matter of law in this case, that in all criminal cases, before conviction can be had,

the jury must be satisfied from the evidence, beyond a reasonable doubt, that the defendant is guilty in manner and form as charged in the indictment; and in order to sustain the defense of insanity it is not necessary that the insanity of the accused be established by a preponderance of evidence. If, upon the whole evidence, they entertain a reasonable doubt as to the sanity of the accused, they must give him the benefit of such doubt and acquit him."

It is apparent that the general doctrine was fully stated, while by the seventh, eighth and twelfth instructions the attention of the jury was specifically called to the issue of insanity, and the law stated as favorably for the defendant as he could possibly require it to be given. By the seventh, they are expressly told that, if there is evidence in the case tending to rebut the legal presumption of sanity, sufficient to raise a reasonable doubt upon that issue, then they should find the defendant not guilty. And so, also, by the twelfth, they are instructed that it was not necessary that insanity of the accused be established by a preponderance of the evidence; but if, upon the whole evidence, they entertain a reasonable doubt as to his sanity, they should acquit. These instructions were perfectly consistent with the people's third instruction, and, when considered with it, announced the correct rule of law, and the jury could not have been misled to the prejudice of the defendant.

The fourth instruction for the people is as to the form of the verdict, and omitted to give the jury the form of verdict if for manslaughter. This it is insisted was erroneous, and was in effect denying the defendant the right of having his guilt of that offense only considered by the jury. This position is not tenable. This question was before this court in *Dunn v. The People*, 109 Ill., 646; and it was there held that, if it was desired by the defendant that an instruction of the form of verdict for the lesser offense should be given, it was his duty to prepare and ask such an instruction, and, failing to avail himself of that right, he was in no position to complain. It is not suggested by counsel, nor can it be seriously contended, that there are in this case any of the elements which, under the statute, would reduce the unlawful killing to manslaughter. The evidence fails to show any such provocation as is required by law to reduce the crime from murder; nor is

there evidence of that sudden impulse of passion, supposed to be irresistible, which will extenuate the unlawful killing. To reduce the homicide from murder to manslaughter there must be both provocation and passion. The instruction given was proper, and is not obnoxious to the objection made; but if it was, the ninth instruction, given at the instance of the defendant, gave the jury correctly the punishment fixed by law to be inflicted for manslaughter; and, if he or his counsel deemed it important, it was their privilege to ask of the court an instruction as to the form of verdict for that offense, and, failing to do so, cannot now be heard to complain.

The fifth instruction, given at the instance of the people, is wholly indefensible. After instructing the jury that it was their duty to consider all of the evidence in the case it proceeds: "But if the jury believe that any witness or witnesses have knowingly and intentionally sworn falsely in the case, the jury are at liberty to disregard the testimony of such witness or witnesses, except so far as their testimony may have been corroborated by other credible evidence in the case," wholly ignoring the principle that such knowingly false testimony must have been to matters material to the issue. We do not hesitate to condemn this instruction. The jury have no right to disregard the evidence of a witness because he may have testified falsely to a matter wholly immaterial to any issue in the case; and this is so well understood that it will not require the citation of authority. If the defendant may have been prejudiced by the erroneous instruction given, it will necessitate the reversal of the judgment against him. It will therefore become necessary to examine the case, as it went to the jury, to determine whether the defendant could be prejudiced by the instruction complained of. Counsel for plaintiff in error criticise the trial court for looking into the facts on motion for a new trial, and determining that there was no such error, upon consideration of the whole case, as would entitle the plaintiff in error to a new trial. It is said the court in so doing usurped the functions of the jury, and thereby in effect tried the defendant without the intervention of a jury. The position assumed by counsel is that if error is found in the instructions the judgment must then be reversed, whether such error operates to the prejudice of the defendant or not. Such

is not the law. In many cases determined by this court the contrary doctrine is announced.

In *Kennedy v. The People*, 40 Ill., 497, it is said:

"This court has often held, when a series of instructions embrace the law of the case, when taken and considered together, though one of them may be erroneous, still for such error a judgment will not be reversed, provided it shall appear from the whole record that substantial justice has been done, and no prejudice has resulted by reason of such erroneous instruction, and that the law of the case has been given fully to the jury."

In *Leach v. The People*, 53 Ill., 311, the court said:

"The instructions were quite voluminous; and that a court, in disposing of them in the hurry of a trial, should commit some errors, is not remarkable. Some given by the court perhaps ought not to have been given, and some refused should have been given; but in all the important legal positions bearing on the facts proved we think full justice was done the prisoner. The instructions given on behalf of the prisoner were as favorable as he had any right to demand, and no court is justified in reversing a judgment if, on the whole record, it appears justice has been done, and there appears no substantial misdirection of the court, by which the prisoner's rights were injuriously affected."

In *Wilson v. The People*, 94 Ill., 327, it is said:

"Objection is urged to the giving and refusing of instructions. Without saying there was not any error in that regard, we are contented that, as a whole, the case was fairly given to the jury. Where the result reached by a judgment is clearly right, it will never be reversed for errors which do not affect the substantial merits of the case."

In *Dunn v. The People*, 109 Ill., 646, it is held:

"While we do not hesitate to condemn the instruction, still we do not think it did any harm in this case, for the reason that the evidence did not leave the guilt of the defendant in doubt. The guilt of the defendant was so clear and palpable from the evidence that no question of doubt could arise; and, while the instruction was erroneous, the error could work no injury in the case."

In *Ritzman v. The People*, 110 Ill., 363, it was held that—

"It is sufficient if the instructions, taken as a whole, sub-

stantially present the law of the case fairly. The criminal laws of this state must be enforced; and if it is not already understood, it is high time it should be, that where a case is clearly made out against the accused, and the jury have so found, this court will not reverse for a mere technical error which it can see could not have affected the result."

Numerous other cases of like tenor might be cited, but these will suffice to show the unvarying rule of law in this state.

Every citizen, when charged with crime, is entitled to a fair and impartial trial, according to the due and orderly course of the law. Every principle of the law applicable to his case he may demand shall be given to the jury, and that nothing shall be given on behalf of the people that may unduly prejudice his cause. This every man, whether guilty or innocent, may require, and more he cannot lawfully demand. The law, for wise purposes, throws around a defendant every safeguard, and he may invoke in his behalf its protection, and, when arraigned, may require that the rules of the law be strictly applied to his case, and that nothing the law does not authorize and warrant shall be done to his injury; but he cannot be heard to complain if an error is committed that cannot operate to his prejudice. Absolute correctness of proceeding cannot be attained, even in our very best courts; and the establishment of any other rule would render the administration of the criminal laws practically impossible. When the defendant has had the benefit of a fair trial by an impartial jury, selected conformable to law, fully and fairly instructed in every principle applicable, with no rulings against him that would tend wrongfully to his inculpation or deprive him of his defense, he has received all that any citizen can rightfully demand of society. Such a trial we think was accorded to the plaintiff in error in the case at bar.

The importance of the case in its results has demanded and it has received at our hands the most careful examination of the record. The killing of Michael Gaynor, on the 13th of May, 1884, is not denied. That it was done without any attending circumstances that furnish any palliation, justification or excuse for the crime is, we think, fully established by the evidence. The court below gave at great length instructions

as to the *quantum* and measure of proof required to convict, and to overcome the defense of insanity interposed by the defendant. Instructions were given as to the presumptions of the law arising out of the facts relied on by defendant; as to the inferences to be drawn from the motive of the defendant, or the absence or the want of it; and indeed, with great ingenuity presenting every principle of law, so far as we can see, that could be applicable to any and every phase of the defense interposed. No complaint is made by counsel in that regard, and it will be unnecessary to make further investigation in that direction.

It is believed that the most careful examination of the evidence will fail to disclose any witness for defendant to whom the jury could have applied the rule announced in this instruction under consideration, except the witnesses Patrick Dacey and Mrs. O'Neil. There is, we think, no circumstance testified to by any other witness, material or immaterial, that was contradicted. True, other witnesses testified as to their opinion of the mental condition of the prisoner as hereinafter noticed, but there are no controverted points in their evidence save upon that question. The witness Mrs. O'Neil testified that the accused was at her house in the afternoon of the day of the homicide, at the time certain of the witnesses had testified to his having been upon the streets, at some distance from her house, making threats against the deceased. It will be apparent that this was material evidence; and if they believe she testified wilfully falsely thereto, the jury would, under the law, be justified in discrediting her testimony except so far as corroborated. The witness Patrick Dacey testified to the mental condition of his brother, the accused, on two occasions, when Dr. Bluthardt was called to see him in jail prior to the trial. In so far as he was contradicted, if contradicted at all, by the witness Bluthardt and others as to the condition of his brother on these occasions, it was material upon the issue of insanity; and hence, if the jury believed from the evidence that he had sworn wilfully falsely in respect thereto, they would be justified in rejecting his testimony, except so far as corroborated. So, as to each instance when there was evidence contradictory, so far as we can see, it was upon some matter material in the case, and therefore, although the jury may have applied the principle

announced in the instruction under consideration, it put the accused in no worse position nor operated to his prejudice to any greater extent than it would if it had announced the correct rule of law.

But, aside from this view, the plaintiff in error could not have been unduly prejudiced by this instruction upon the case made and submitted to the jury. It will be remembered that the plaintiff in error brings this case to this court and insists that error has intervened to his prejudice, and we are called upon to determine that matter from the whole record. If, as already seen, upon the whole record, it clearly and conclusively appears that the giving of the instructions, or any of them, could not have produced the result of the trial, but that, whether given or not, the result must have been the same, it will follow that no reversal can be had.

The facts leading up to and immediately surrounding the killing of Michael Gaynor are not disputed, and are briefly as follows: On the 13th day of May, 1884, there was an election for alderman of the ninth ward, in the city of Chicago. Some weeks prior thereto the primaries or ward caucuses were held, and about the time of the primaries the prisoner, it appears, was arrested and fined, which, for some reason not disclosed, he attributed to Gaynor and one Bowler, sergeant of the police. Shortly after that time he is shown to have entered a saloon and, calling for a drink, said: "I'm going down to square that fine. . . . I am going to kill Bowler on sight, and Gaynor too." At the election mentioned, Mahoney and Murry were candidates, Gaynor supporting the former, and the defendant Dacey the latter. Some two weeks prior to the election two witnesses testify that they advised the accused to give up the contest and go away, and he replied: "I am not going to live long, and I will take Bowler or Gaynor with me." The night before the election the accused purchased a revolver, alleging that he was to act as one of the challengers on the next day. On the morning of the election, being the 13th of May, a witness testifies that he saw the defendant Dacey at the corner of Washington and Clinton streets, and Dacey then "swore by the Eternal God he would kill Gaynor before he would sleep that night." Some time after the election opened the judges of election refused to permit Dacey to remain inside

where they were, as one of the challengers, and he was put out. About 10 o'clock, Murry, whom defendant Dacey supported, was withdrawn from the canvass. It is shown that this angered defendant Dacey greatly. Three witnesses testify that about half past 10 o'clock he said to the deceased, in substance, that his man Murry was out of the field, and said: "Mike, you have downed me this time, but you'll never do it again." In the afternoon, between 1 and 4 o'clock, as testified to, he got into conversation with a witness, when the witness expressed sorrow that he had been arrested and fined, whereupon defendant replied, "That's nothing; I will get even;" then, exhibiting the handle of a revolver, said, "Do you see that? I'll knock Bowler or Gaynor out with this." Another witness testifies that "on Halsted street, just before the murder, he said he was going to shoot either Bowler or Gaynor that night."

We cannot state in detail the conversations leading up to and circumstances surrounding the defendant at the time of these declarations. It is apparent, however, that the animosity engendered by his arrest, for which he held Gaynor accountable, was intensified by the subsequent events alluded to, and these threats were the deliberate expression of intense hatred and ill will towards the deceased.

Between 10 and 11 o'clock on that night, Michael Gaynor and the witness McIntyre entered a saloon on Halsted street, in which defendant Dacey was sitting. Those present were asked to the bar by Gaynor, and Dacey came forward, approaching Gaynor, and said: "You have been fighting me for two years. Will you shake hands now?" McIntyre interfered, and offered to bet Dacey \$20 that Gaynor would not shake hands with him. Dacey had extended his hand; but, Gaynor apparently not noticing it, smilingly turned away from him and to the bar, took up his glass, and said, "Never mind, Jim; let us have a fresh one." Without a word of warning, and standing nearly behind and only a few feet away, the defendant drew his revolver and fired a ball into the brain of Michael Gaynor, the shot taking effect in the back part of the head and ranging forward. Gaynor fell to the floor, and those present secured the defendant. Upon having done so, on examination of the prostrate Gaynor, it was found that he was

unconscious, though life was not extinct, and he was at once removed to his home, where he lingered until the 24th day of May, 1834, and died from the wound thus inflicted. Whilst the defendant was being taken to the police station immediately after the shooting, he was asked why he did it; and replied to the officer, "I did it on account of a little political difficulty." The facts immediately connected with the killing of Michael Gaynor are testified to by at least three witnesses, none of whom are discredited, and who give the same account, in all essential particulars, of the homicide and its attendant circumstances.

The events culminating in his death are clearly shown, and evince beyond question, as we think, that the plaintiff in error was actuated by malice, and that nothing is shown or appears to extenuate, justify or excuse his wicked act. It matters not whether his grievance was real or imaginary, or whether he desired to shake hands, or only extended his hand to provoke a quarrel, the evidence shows that the shooting of the deceased was premeditated, and prompted by a cruel and wicked desire for revenge.

Heretofore we have not considered the evidence bearing upon and tending to sustain or rebut the defense of insanity interposed; but a very brief analysis of the testimony offered for and by the defendant will demonstrate, we think, the correctness of the view expressed. The defendant had lived in Chicago five years immediately preceding the homicide, had held a position in the "county house," had been connected with ward politics, was a member of one of the labor unions, and is shown in other ways to have known many people in that city. He was tried in an adjacent county, whither his case had been transferred at his instance, and within an hour or two, by railway, of his acquaintances and friends. After his motion for a continuance had been overruled, before any steps had been taken, the cause was delayed nearly a week before commencing the trial, and several days additional elapsed before he was required to put in his evidence. There is no complaint in the affidavit for continuance that all the witnesses from Chicago could not be procured that could be had if more time was allowed, nor was any such complaint made in or to the circuit court, except that it was asked to await the arrival

of a train, which was immediately done,— the court adjourning over for that purpose; nor is any such complaint made or suggested here.

The defendant, by his counsel, called seven witnesses upon that issue: Dr. Joseph Krosh, Dr. Thomas Waugh, James Bonfield, William O'Neil, Sarah O'Neil, Thomas Powers and Patrick Dacey.

Of these witnesses Dr. Krosh, who had attended him from the time of his arrest, with every opportunity for observation and examination, testified that he visited the defendant as often as three times a week during his confinement in jail, and at no time saw anything to induce him to think or believe the defendant's mental condition was anything but normal; and he found him in a normal mental condition.

Dr. Waugh had met the defendant prior to May 13, 1884, and again met him that day, about noon, and invited him into a saloon to take a drink. While there, a man by the name of McIntyre came in, and witness, apprehending a difficulty, advised the defendant to go home and avoid all trouble. He next saw defendant in jail after his removal to Woodstock for trial, made an examination, and found him in a normal mental condition. The only manifestation to the contrary was that, among the exciting events of the 13th of May, he claimed to have forgotten having met the doctor in the saloon. The doctor, upon hearing of the shooting of Gaynor, had said that Dacey must be crazy to shoot his best friend, and still thought so. Upon his examination of the accused he found some evidences of an old wound on his head, which, in the witness' opinion, might, under some circumstances, have produced mental disturbance; but testifies that defendant was in a normal mental condition, and does not testify that at any time he saw anything indicating that these wounds had affected defendant's mind, or any evidence of mental disease whatever, and based his opinion of defendant's insanity solely upon the ground that a man must be crazy who would shoot his best friend, and what he heard of defendant. He had heard of no difficulty or ill feeling between Dacey and Gaynor, and in view of the evidence it is apparent that the principal basis for the doctor's opinion was entirely wanting.

The witness William O'Neil testified that he had known

defendant. Some years ago he had seen him struck on the head with a beer keg, but never saw anything at any time to induce witness to think he was insane or of unsound mind.

The witness Bonfield had been deputy-jailer of Cook county some years before the trial. The defendant had been brought to the jail suffering from *delirium tremens*, and was kept there two weeks, during which his mind was in an unnatural condition, and was then discharged; had known the defendant since, and had seen nothing after his discharge to induce witness to think that he was insane or of unsound mind.

Thomas Powers testified that he thought the defendant insane, and gave as his reason therefor that on one occasion he, Dacey, and a strange man had been playing cards in a saloon, and Dacey said to the stranger, "I could break your back;" and, witness thought, looked and acted like as if he was not in his right mind. Witness had also heard him make speeches in the union to which they both belonged, and did not think he talked right, and was of opinion defendant was insane.

Mrs. Sarah O'Neil testified that the defendant returned to her house about 2 o'clock of the day that Michael Gaynor was killed, and remained until in the evening; that he acted strangely. She asked him if he was drunk or crazy, to which he replied that he was not drunk, but was crazy with pain. The witness described his condition as she saw him, and the symptoms detailed would by no means necessarily indicate insanity, and could quite as well proceed from other causes as from mental disease. The witness thought he might or might not be crazy, but thought he was insane.

As to the remaining witness called by the defense upon this issue, Patrick Dacey, but little need be said. He lived at Buffalo, New York, but a portion of the time had been in Chicago since his brother James resided there. This witness testified to the "spells" of *delirium tremens* testified to by Bonfield, Bluthardt, and others, occurring from two to five years before the homicide. He had lived with his brother in Buffalo substantially ten years before his brother came to Chicago. The defendant was afflicted with "spells," and witness had nursed him, sent for the doctors, who had treated him for pneumonia and trouble in his head, and always seemed to relieve him. The last one of these spells occurred some nine years prior to

the trial, to the best of the witness' recollection. This witness was of opinion that for more than ten years the defendant had been insane, and was so at the trial.

The testimony of some of these witnesses strongly tends to rebut any inference of insanity, while the testimony of all, when considered together, in our judgment, falls short of overcoming the presumption of the sanity of the accused. When, however, it is made apparent by the evidence, as we think it was, that the recurrence of *mania a potu*, testified to by the witnesses, had not affected or impaired the mind of the defendant, and the evidence of Powers, Patrick Dacey and Mrs. O'Neil is considered in connection with the other evidence bearing upon the question of the sanity of the accused, as well as upon his conduct previous to and at the commission of the crime, there cannot, we think, a doubt remain in the mind of any reasonable person that the defendant knew right from wrong, and was fully capable of comprehending the moral quality of his act, and mentally capable of making intelligent choice in respect thereto.

It is suggested, however, rather than argued, that from the peculiar condition of the accused at the time,—being to some extent in ill health,—he was subject to insane delusions, when excited by intoxicating liquor or other cause; that there was, by excitement, produced a species of emotional insanity. We can see no evidence of this; but, if true, the emotional condition must have lasted from early morning until nearly midnight on the fatal 13th of May, if it had not existed some weeks before, and this, in view of the evidence, is impossible. In any event, when the defendant, actuated by actual malice, arms himself, fixes the time within which his victim must be slain, seeks the opportunity, and, without warning, sends the fatal shot crashing through the brain of his fellow creature, the frenzy of the instant, for which he has waited and threatened to bring about, will neither in law nor morals absolve him from responsibility for the crime.

We are constrained, after a most careful examination of this record, to hold that the evidence fully sustains the finding of the jury, and that in no event, with or without this instruction complained of, could any other verdict have been rightfully or lawfully rendered. In no sense, under the rule of law as de-

clared in the cases cited and others of this court, and which is alike binding upon us, as upon every other citizen, can it be said that the error in this instruction operated or could operate to the prejudice of the defendant. If we were not satisfied from this record of the sanity of the defendant, we might be inclined to hold that the trial court, in the exercise of a wise discretion, should have continued the cause; but that court was fully cognizant of the surrounding circumstances, and of the necessity for such action, and the record made in the cause would not justify us in reversing for that cause.

We are of opinion that the defendant had a fair and impartial trial, with every right accorded him that the law justifies or requires. Having reached this conclusion, we are compelled to hold that we find in this record no such error as will warrant an order of reversal, and the judgment of the circuit court of McHenry county herein will therefore be affirmed, which is accordingly done.

NOTE.—Test of mental capacity, see *State v. Nixon*, 5 Am. Cr. R., 307, and note.

BOHANAN v. STATE.

(18 Neb., 57.)

MURDER: *Effect of new trial—Juror—Improper argument of counsel—Exceptions—Practice.*

1. MURDER—EFFECT OF VERDICT OF GUILTY OF LOWER DEGREE ON SECOND TRIAL.—Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial.¹
2. JUROR—COMPETENCY.—If, upon examination of a juror, it is shown that he has an opinion founded upon newspaper reports, and it shall satisfactorily appear that the character of such opinion is such that it will not interfere with his rendering an impartial verdict, it is not error to admit him on the jury.
3. IMPROPER ARGUMENT OF ATTORNEY—EXCEPTIONS.—Where it is alleged that an attorney, in the argument of a cause on trial to a jury, went outside of the record and appealed to the passions and prejudices of the

¹ See note.

jury, the attention of the court should be called to the language and conduct of the attorney by the proper objection, and a ruling had thereon by the court. If the objection is overruled and an exception taken to the ruling, the question may be reviewed in the supreme court upon the decision of the trial court. Without such ruling and exception, there is nothing for the reviewing court to consider.

Error to the District Court for Otoe County.

C. E. Magoon and *O. P. Mason*, for plaintiff in error.

William Leese, attorney-general, and *J. B. Strode*, district attorney, for the state.

REESE, J. The plaintiff in error was indicted by the grand jury of the February term, 1882, of the district court of Lancaster county. There was but one count in the indictment. The crime charged was murder in the first degree. A trial was had at the following (May) term of court, which resulted in a conviction of murder in the second degree. Plaintiff in error then brought the cause into the supreme court, where the judgment of the district court was reversed, and a new trial ordered. See *Bohman v. State*, 15 Neb., 209. A change of venue was then taken, by which the place of trial was removed from Lancaster to Otoe county. On the second trial the jury found him guilty of murder in the first degree. A motion for a new trial was made and overruled, and the court imposed upon him the penalty of death. He now prosecutes error in this court.

Prior to the commencement of the last trial, the plaintiff in error filed in the district court a plea of former acquittal of the charge of murder in the first degree. This plea contained a recital of the facts of the previous trial on the same indictment, and the conviction thereon of murder in the second degree, and his sentence to the penitentiary for life. To this plea the state made answer, alleging that the plea ought not to be sustained, for the reason that on defendant's own motion the verdict and judgment were set aside, and a new trial granted. Plaintiff in error demurred to this answer. The demurrer was overruled. The plea was held bad, and the first trial held not a bar to a prosecution for murder in the first degree, as charged in the indictment. During the progress of the trial plaintiff in error requested the court to instruct the jury as follows: "(10) If

the jury find from the evidence that at the May term, 1882, of the district court of Lancaster county, in the state of Nebraska, the defendant was tried upon the same indictment upon which he is now being prosecuted, and upon such trial was found guilty of murder in the second degree, and judgment was rendered against him upon such finding, then, as a matter of law, the jury in this case cannot find the defendant guilty of murder in the first degree." The court refused to give this instruction, but instructed the jury as follows upon that question: "(11) You should not be influenced in the least by anything that any other jury may have done." To the refusal to give the first above quoted instruction, and to the giving of the second, plaintiff in error excepted.

By the foregoing it will be seen that the question here presented is whether or not the verdict of the jury on the first trial, finding plaintiff in error guilty of murder in the second degree, is such an acquittal of the crime of murder in the first degree as would protect and shield plaintiff in error from the danger of a conviction of the higher crime on the second trial, the verdict and judgment having been set aside upon his own motion and request. The question here presented is a new one in this state, and is one of great importance. The question is not new, in the sense of its never having been decided in other states; but, unfortunately, the decisions of courts of last resorts in other states upon the question here presented have not been uniform. The doctrine contended for by plaintiff in error has, to a greater or less extent, been declared by the supreme courts of Virginia, California, Tennessee, Illinois, Michigan, Iowa, Mississippi, Wisconsin, Indiana, Alabama, Texas, Missouri and Arkansas. It is not deemed necessary to notice the decisions of all those states, as some of them are simply *dicta*, and some are in cases dissimilar to the one at bar; but we will notice the reasoning in what we deem the leading cases upon the subject. In *The People v. Gilmore*, 4 Cal., 376, the accused was indicted for murder. Upon trial the jury rendered a verdict of guilty of manslaughter, which was set aside on the prisoner's motion, and a new trial ordered. On the second arraignment he pleaded a former acquittal. Chief Justice Murray, in writing the opinion of the court, which at that time (1854) consisted of himself and Mr. Justice Haydenfeldt,

argues the question at some length and with ability, but to the mind of the writer his deductions are not conclusive. From the opinion I quote, as his first proposition, as follows: "A conviction for manslaughter is an acquittal of the charge of murder, and the verdict, though general in its terms, must by legal operation amount to an acquittal of every higher offense charged in the indictment than the particular one of which the prisoner is found guilty. The reason is obvious. If such were not the case, the party, after undergoing punishment for manslaughter, might be arraigned and tried again for murder, notwithstanding he had been compelled to answer this charge upon the first trial, and the jury had passed upon the same." This is undoubtedly correct, so long as the verdict of the jury is allowed to stand. It must be conceded that, until the accused himself procures the cancellation of the verdict, the judgment must be a complete protection against another prosecution for the same crime. So also would be a verdict of not guilty. But where the prisoner, upon his own motion, procures a verdict to be set aside, the rule should be otherwise. In support of his conclusion the learned writer cites *Hurt v. The State*, 25 Miss., 378, and quotes as follows: "The jury in such case, in contemplation of law, render two verdicts. The one acquitting him of the higher crime, the other convicting him of the inferior." It is quite difficult for us to adopt this proposition. The verdict in such case must be an entirety. The prisoner stands charged with the unlawful killing of the deceased. He is either guilty or not guilty. If found guilty, it is the next duty of the jury to ascertain the magnitude of this guilt. When that is done the verdict of guilty is returned, with a finding as to the grade of that guilt. At the time this decision was made, the Criminal Code of California contained the following section: "A new trial is a re-examination of the issue in the same court before another jury after verdict has been given. It places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument." This section was not deemed sufficient to justify the court in putting the prisoner upon his trial for murder, but the court combats the power of the legislature to enact such a law, by the following: "The constitution of this state has provided

that 'no person shall be subject to be twice put in jeopardy for the same offense.' Now, if I am right that a conviction for manslaughter is an acquittal for murder, it must follow that any law that would compel a party to be retried for murder in order to escape the minor offense, thereby putting the party in jeopardy, is in conflict with this provision of the constitution." Thus the learned judge in the discussion of the case goes beyond the rulings of any of the other courts.

The supreme courts of Kansas, Indiana, Kentucky, North Carolina, and others, have not hesitated to follow such laws and apply the principle to capital cases. And in California, in a recent decision, the supreme court has, to the mind of the writer, fully overruled the holding in *The People v. Gilmore*. In *The People v. Keefer*, reported in 3 Pac. Rep., 818, it is held that "on a plea of former conviction under an indictment for murder, the fact that defendant was convicted of murder in the second degree will not be a bar to a conviction of murder in the first degree on a retrial." It is insisted that this decision was made under a provision of the statute enacted in 1874, which is as follows: "The granting of a new trial places the parties in the same position as if no trial had been had. All the testimony must be produced anew, and the former verdict cannot be used or referred to, either in evidence or in argument, or be pleaded in bar of any conviction which might have been had under the indictment." It will be observed that in essence this section does not vary materially from the one in force at the time of the decision in *The People v. Gilmore*. It can do little more than to place the parties "in the same position as if no trial had been had," as provided in the first act. But it is worthy of notice that a careful examination of the opinion in *The People v. Keefer* fails to disclose any reference to the act of 1874. The decision, by a unanimous court, is based entirely upon another section of the Criminal Code, which was passed in 1856, which divided the crime of murder into two degrees, the first and second. The section, as amended April 19, 1856, is as follows: "Malice shall be implied when no considerable provocation, or when all the circumstances of the killing show an abandoned and malignant heart. All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and

premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person indicted for murder shall be tried shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed by examination of witnesses to determine the degree of the crime, and give sentence accordingly. Every person convicted of murder of the first degree shall suffer death, and every person convicted of murder of the second degree shall suffer imprisonment in the state prison for a term not less than ten years, and which may extend to life."

The court, in the opinion by Judge McKinstry, uses the following language: "The indictment charges the crime of murder, and the defendant was not acquitted of murder by the first verdict. In dividing the crime of murder into two degrees, the legislature recognized the fact that some murders, comprehended within the same general definition, are of a less cruel and aggravated character than others, and deserving of less punishment. It did not attempt to define the crime of murder anew, but only to draw certain lines of distinction by reference to which the jury might determine, in a particular case, whether the crime deserved the extreme penalty of the law, or a less severe punishment. *People v. Haun*, 44 Cal., 98; *People v. Doyell*, 48 Cal., 94. After the act of 1856, which divided the crime into murder of the first and second degrees, murder remained, and it still remains, the unlawful killing of a human being with malice aforethought. Penal Code, 187, 188. The malice may be express or implied; the express intent to kill, or to commit one of the named felonies, may be affirmatively established; or the killing, being proved, the malice may be implied; but in either case the crime is murder. The fact that a severer penalty is to be imposed in one case than the other does not change the effect of a previous conviction, and the defendant who, on his own motion, secures a new trial subjects himself to a retrial on the charge of murder, whether the first verdict was guilty of murder of the first or of the second degree. At

the second trial he may, if the evidence justify such verdict, be found guilty of murder of the first degree."

It will be observed that the provisions of the amended act of 1856 are very similar to the provisions of sections 3, 4 and 489 of the Criminal Code of Nebraska, except that murder in the second degree is not specifically described. The sections above referred to are as follows: Sec. 3. "If any person shall purposely, and of deliberate and premeditated malice, or in the perpetration, or attempt to perpetrate, any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill another; or if any person by wilful and corrupt perjury, or by subornation of the same, shall purposely procure the conviction and execution of any innocent person,—every person so offending shall be deemed guilty of murder in the first degree, and, upon conviction thereof, shall suffer death." Sec. 4. "If any person shall purposely and maliciously, but without deliberation and premeditation, kill another, every such person shall be deemed guilty of murder in the second degree; and, on conviction thereof, shall be imprisoned in the penitentiary not less than ten years, or during life, in the discretion of the court." Sec. 489. "That in all trials for murder, the jury before whom such trial is had, if they find the prisoner guilty thereof, shall ascertain in their verdict whether it be murder in the first or second degree, or manslaughter; and if such person be convicted by confession in open court, the court shall proceed, by examination of witnesses in open court, to determine the degree of the crime, and shall pronounce sentence accordingly."

By section 19 of the act of California passed in 1850, and which, so far as we are able to ascertain, still remains upon the statute books of that state, murder is defined to be "the unlawful killing of a human being with malice aforethought, either express or implied. . . ." In *Baldwin v. State*, 12 Neb., 61, the then chief justice, Maxwell, in delivering the opinion of the court, in referring to the indictment, which charged in separate counts the crime of murder in the first degree, says: "There is but one offense charged in the indictment in this case, viz., the unlawful killing of Allen J. Yokum." If, therefore, there is but one offense charged in the indictment in the case at bar,—the unlawful killing of James Cook,—it

would seem that the adjudications of the state of California may well be said to sustain the action of the trial court in placing the plaintiff in error upon his trial for murder in the first degree. In *People v. Haun*, 44 Cal., 96, the supreme court, by Judge Becher, in speaking of the division of the crime of murder into two degrees, says: "In making the division the legislature recognized the fact that some murders, comprehended within the general definition, are of a less cruel and aggravated character than others, and therefore deserving of less punishment. It also recognized the fact that some murders of the less aggravated class are deserving of less punishment than others of the same class, and it accordingly provided that murders of the second degree should be punished by terms of imprisonment depending for their length upon the circumstances of each particular case. In all this, however, the legislature did not intend to say that murder of the second degree should be anything less or other than murder. It did not, indeed, attempt to define murder anew, but only to draw certain lines of distinction by which it might be told in a particular case whether the crime was of such a cruel and aggravated character as to deserve the extreme penalty of the law, or of a less aggravated character, deserving a less severe punishment." The same doctrine is held in *People v. Form*, 25 Cal., 361.

In *Brennan v. The People*, 15 Ill., 511, and in *Barnett v. The People*, 54 Ill., 325, the supreme court of that state have held that a defendant cannot upon a second trial be tried for a degree above that for which he was convicted upon the first. In *Barnett v. The People* the court simply follows *Brennan v. The People*, without argument or criticism. The decision in the latter case is based upon the cases of *Slaughter v. The State*, 6 Humph., 410; *Morris v. The State*, 8 S. & M., 762; and *Hurt v. The State*, 25 Miss., 378. In *Slaughter v. The State* the plaintiff in error was indicted for murder in the first degree, and upon trial was found "not guilty of murder as charged in the bill of indictment, but they find him guilty of voluntary manslaughter in manner and form as charged in the indictment." On his motion a new trial was granted. At a subsequent term he filed a plea of former acquittal, setting out the proceedings and verdict of the jury. He contended that he

was entitled to his discharge, and that he could not be tried for *any* crime under that indictment. The trial court held otherwise and put him upon trial for manslaughter. Error was taken to the supreme court, and it was held that the trial court decided correctly. The question as to whether the plaintiff in error could have been convicted of a higher crime than manslaughter was in no sense before the court. Yet it is said that if he had been tried for murder, it would have been erroneous. It is quite probable that the *finding* of "not guilty of murder" by the verdict would make no difference as to the power of the court to put the accused upon his trial on the whole indictment; yet the court refers to it as a verdict of acquittal.

Morris v. The State, 8 S. & M., 762, was a case where the defendant was put upon trial under an indictment containing four counts: (1) With the forgery of a bank note of the Bank of the State of North Carolina; (2) with uttering and publishing as true a forged bank note of the Bank of the State of North Carolina; (3) with having in his possession certain forged bank notes of the Bank of the State of North Carolina, with the intent to utter the same. The fourth was similar to the third. The verdict of the jury was guilty as charged in the second, third and fourth counts. The verdict was objected to as imperfect because there was no express finding upon the first count. The cause was taken to the supreme court (Mississippi), where the verdict was held good; but the cause was reversed for error occurring in the introduction of testimony. The judgment of reversal provided that the new trial should be confined to the second, third and fourth counts, the plaintiff in error having been acquitted upon the first count. It will thus be seen that the question in the case at bar was not before that court for two reasons — *First*, the question did not arise in the case; *second*, each count in the indictment was for a separate and distinct offense, and not for different grades or degrees of the same offense. The case of *Hurt v. The State*, 25 Miss., 378, was one in which the plaintiff in error had been indicted for murder. He filed certain pleas in abatement, alleging the illegal organization of the grand jury which found the indictment. These pleas were overruled by the court, and he was put upon trial, which resulted in a verdict of guilty of manslaughter in the third degree. His motion for a new trial

being overruled, he alleged error in the supreme court, and a new trial was granted upon the ground that the plea in abatement should have been sustained. The judgment of the trial court was reversed, the court holding that its judgment of reversal should extend no further than to relieve him as against the verdict against him (manslaughter). As a new indictment would have to be found, and as a prosecution for the crime of manslaughter was barred by the statute of limitations, the prisoner was, upon his motion, discharged. The reasoning of the court in this case seems to be based upon the acknowledged and conceded fact that if a party charged with murder and convicted of manslaughter seeks no relief from the judgment of conviction, but allows it to stand unreversed, and in full force, he cannot, after serving his term of imprisonment, be again prosecuted for murder. This is most certainly true. If the judgment stands unimpeached, it is the final judgment of the case, and of course will stand as a protection to the party convicted. From this the court concludes that the other proposition must follow, viz., that if the jury convicts of a lower grade of the same crime, that conviction is necessarily an acquittal of the higher grade, and that acquittal must stand for all time, notwithstanding the verdict and judgment of conviction may be set aside; that the jury, in contemplation of law, renders two verdicts, one acquitting of the higher crime, and the other convicting him of the lower, and that the verdict is not an entirety.

Upon this theory we think that case, as well as *Brennan v. The People*, rests. And, indeed, the same may be said of *The State v. Tweedy*, 11 Iowa, 350; *The State v. Martin*, 30 Wis., 216; *The State v. Belden*, 33 id., 120; *Jones v. The State*, 13 Tex., 184. These latter cases are exhaustive and well written, and were it not that they all seem to be grounded upon what seems to us to be a false basis, we could well follow them. The case of *Johnson v. The State*, 29 Ark., 31, is a full digest of all the cases so holding, and, adopting the same reason, holds with them. It is beyond the comprehension of the writer to say that the *character* of an act may be finally and forever decided upon and adjudicated, while the fact of the act itself is left untouched. Thus a person is indicted for murder in the first degree under the laws of Nebraska. Upon trial he is

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found guilty of murder in the second degree. So long as that verdict and the judgment stand unreversed, there is an adjudication that the act or crime was committed, and also fixing the character or quality of the act. Now, it is very clear and easily understood that this judgment and verdict will protect the accused from another prosecution. But suppose a new trial is granted. There is no adjudication that any person has been killed, nor that any crime has been committed. But it is said there *is* an adjudication that *if* the deceased was killed by the prisoner, it was not done of deliberate and premeditated malice. It is contended that such a verdict is severable; that there are, in contemplation of law, two verdicts: one of guilty of murder in the second degree, which has been set aside; and one of not guilty of murder in the first degree, which, by virtue of the constitutional provisions in the federal and state constitutions, must stand. This theory is also built upon what is considered the difference between an adjudication and having been once in jeopardy. It is true that this distinction does exist to some extent, but yet if the first verdict is worth anything to a prisoner, it must be upon the theory that he has been *acquitted* in so far as the criminal quality of the act of killing is concerned, but no further. In *Hurley v. The State*, 6 Ohio, 400, it is decided that the simple verdict of a jury is not a sufficient acquittal to entitle a defendant to its protection, but that, to be of any force, there must be a judgment on the verdict; citing 2 Hale, P. C., 243.

By the statutes of this state a new trial, after a verdict of conviction, may be granted on the application of the defendant for certain reasons which are set out in the act. See section 490, Criminal Code. A new trial is defined to be a re examination of an issue of fact. Bouv. Law Dict. It is a retrial of the facts of the case. In *Zaleskie v. Clark*, 45 Conn., 401, Judge Loomis, in writing the opinion of the court, says: "It is believed that it always has been used in the sense of a complete retrial of the cause, except in certain instances" mentioned by him. What else can a retrial be than a re-examination of the facts in the same case? The principal case in which it has been held, in the absence of a statute to that effect, that a defendant can be retried upon the whole indictment, is *The State v. Behimer*, 20 Ohio St., 572. In fact, the supreme court of Ohio

have uniformly so held. In *Hurley v. State*, *supra*, it is decided that "a verdict in either a civil or criminal case must be considered an entire thing." In *Lesslie v. State*, 18 Ohio St., 390, the plaintiff in error was indicted for murder in the first degree. The indictment contained three counts, but each alleging and charging the same offense in the same degree. On the first trial he was found "guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second count of the indictment." Upon his motion a new trial was granted, and upon the second trial he was found "guilty of manslaughter as charged in the third count of the indictment, and not guilty as charged in the first and second counts of said indictment." Lesslie then moved the court to discharge him, for the reason that on the first trial he was found guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second and third counts, and that upon the second trial he was found not guilty upon the first and second counts of the indictment, and guilty of manslaughter upon the third count, and that the verdict of manslaughter was irregular, illegal and void. The motion was overruled, he was sentenced to the penitentiary, and took error to the supreme court. The conviction was affirmed. In discussing the question of the entirety of the verdict, Judge White, who wrote the opinion, says: "Where the indictment, though consisting of several counts, is founded upon a single transaction, the verdict is a unit and lays the foundation for but a single judgment. A verdict of guilty upon one of the counts, and of not guilty upon the others, is followed by the same legal consequences as a verdict of guilty upon all the counts; and when in either case the verdict is set aside and a new trial granted on the defendant's motion, the case is opened for a retrial upon the counts upon which he was acquitted as well as those upon which he was convicted."

But where the several counts of an indictment are for separate and distinct offenses, the rule would of course be different, and it was so held in the case under consideration. The court says further: "We think the principle contended for properly applies where there is a conviction and an acquittal on different counts for separate and distinct offenses, or where

part of the defendants are acquitted and part convicted of the same offense; but where all the counts are for the same offense and are varied merely to meet the proof, it has no just application." The ruling in this case was followed in *Jarvis v. State*, 19 Ohio St., 585. In the case of *State v. Behimer, supra*, Judge White, in writing the opinion of the court, thus states the question for decision: "The question for decision, therefore, is whether the legal effect of granting a new trial was to set aside the whole verdict, and leave the case for retrial upon the same issues on which it was first tried, or whether the retrial was properly limited by the court to the degree of homicide of which the defendant had been found guilty, and to the inferior degree of manslaughter." The question is discussed at considerable length and with a good degree of logic and reason, and it was finally held that the defendant, in the prosecution, could be put upon a second trial upon the whole of the indictment, the same as though there had been no previous trial and verdict. In the course of the opinion, the learned judge makes use of the following language: "But the effect of setting aside the verdict finding the defendant guilty was to leave at issue and undetermined the fact of the homicide; also the fact whether the defendant committed it, if one was committed. The legal presumption on his plea of not guilty was of his innocence; and the burden was on the state to prove every essential fact. The only effect, therefore, that could be given to so much of the verdict as acquitted the defendant of murder in the first degree, after the rest of it had been set aside, would be to regard it as finding the qualities of an act while the fact of the existence of the act was undetermined. This would be a verdict to the effect that if the defendant committed the homicide, he did it without deliberate and premeditated malice. There can be no legal determination of the character of the malice of a defendant in respect to a homicide which he is not found to have committed; or, rather, of which, under his plea, he is in law presumed to be innocent." Upon the question of the entirety of the verdict it is said: "But upon mature consideration we are of the opinion that the verdict is severable only when there is a conviction or an acquittal on different counts for separate and distinct offenses, or where there are several defendants; but that where there is

but one defendant, and in fact but one offense, the verdict is entire." The cause was taken to the supreme court upon the exception of the state's attorney, and the decision could in no way affect the rights of the defendant in the prosecution; but the rule of law was stated by the court as follows: "Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial."

It must be conceded that in point of numbers this decision seems to be against the weight of authority; but it is apparently founded upon reason, and upon the advanced idea of American jurisprudence. That it is just, it seems to us, cannot be questioned. That it is necessary for the protection of the law-abiding citizen is equally clear; and the fact that many of the states have incorporated a provision to that effect in their criminal laws gives weight and force to the statement. This decision was made in the year 1870. The criminal law of the state of Ohio was adopted by the legislature of this state in 1873, almost bodily, and by the one act entitled "An act to establish a Criminal Code," passed March 4th of that year. By it the entire criminal law of that state was substantially transferred to the statute books of Nebraska, and in which was the law governing new trials. In *Franklin v. Kelley*, 2 Neb., 104, Chief Justice Mason, in writing the opinion of the court, says: "The rule is well settled that when a legislature re-enacts a statute upon which a construction has been placed, it does so with the construction annexed;" citing a number of cases; in addition to which we cite 2 Bish. Crim. Law, § 905, and note from *Com. v. Hartnett*, 3 Gray, 450. While it may be true that the Ohio decisions cannot with strictness be said to be a construction of any statute, yet they are a construction of that part of the Criminal Code which gives to the courts of the state the power to grant new trials, and therefore of the legal status of the person to whom the new trial has been awarded. To that extent, at least, it is proper to consult those adjudications as affecting the Criminal Code at the time of its adoption by this state.

But the Ohio cases are not without precedent. In *U. S. v. Harding*, Wall. Jr., 127, in the circuit court of the United States for the eastern district of Pennsylvania, Harding was found guilty of "murder," and Grimes and Williams of "manslaughter." Soon after the trial, Judge Baldwin, the circuit judge, died. A motion for a new trial was made before and argued to Judge Randall, the district judge; but before passing on the motion he died. New judges were appointed, and upon their qualification the cause came on for decision. The order of the court was that a new trial be granted to Harding, and that as to Grimes and Williams the case be continued for one week, at the expiration of which they were to elect whether they would take a new trial, or abide their former conviction. Judge Grier then addressed Grimes and Williams as follows: "*William Grimes and John Williams*: You ought clearly to understand and weigh well the position in which you now stand. You have been once tried and acquitted of the higher grade of offense charged against you in this indictment, the penalty affixed to which is death; but you have been convicted of the minor offense of manslaughter. Your lives have been in jeopardy and you have escaped. The constitution of your country declares that 'no person shall be twice put in jeopardy of life or limb for the same offense.' This is to shield you against oppression and injustice, and puts it out of the power of the court to subject you to the danger of another trial, except at your election and request. We believe that you have the right to waive the protection thrown around you by the constitution for the sake of obtaining what may seem to you a greater good. But let me now solemnly warn you to consider well the choice you shall make. Another jury, instead of acquitting you altogether, may find you guilty of the whole indictment, and thus your lives may become forfeited to the law. If you choose to run this risk, and to again put your lives in jeopardy, it must be by your own act and choice, being neither compelled nor advised thereto by the court; and when your solemn election shall have been put on record, the court will hold you forever after estopped to allege that your constitutional rights have not been awarded to you. Before we enter of record an order for a new trial as to you, we will give you one week to ponder carefully on this subject, and

consult with your counsel as to what will be your safest and best course."

In *State v. Commissioners*, 3 Hill (S. C.), 239, the defendants were indicted in two counts for obstructing a public street. The trial resulted in a verdict of guilty as charged in one count of the indictment, nothing being said as to the other. A new trial was granted upon the motion of the defendants. It was held that the next trial must be upon both counts of the indictment. In the opinion, Butler, J., says: "If the verdict of guilty had remained, it would have protected them, perhaps, against another indictment for the same offense. As long as a verdict of guilty remained on the record, there was a finding; but what proceeding is there now on it? I consider all the proceedings on the indictment, since the finding by the grand jury, to be set aside at the instance and for the benefit of defendant." As before stated, the states of Kansas, California, Indiana and Kentucky have all held to the same doctrine. See *State v. McCord*, 8 Kan., 232; *People v. Kefer*, *supra*; *Veatch v. State*, 60 Ind., 291; *Com. v. Arnold*, 6 Crim. Law Mag. (Ky.).

But it is claimed by plaintiff in error that these decisions were made by virtue of the statutes of those states, which provide, in substance, that when a new trial is granted the parties shall be in the same position as if no trial had been had; some also providing that the first trial and verdict shall not be referred to on the second trial, nor shall the first verdict be pleaded in bar of a conviction on the second trial, either in the evidence or argument. It is true, the decisions referred to have, in some instances, been predicated upon the statutes referred to, and, did a similar statute exist in this state, much of the trouble in this case would be obviated. But it may also be observed that if the clause in the bill of rights in both the federal and state constitutions, that a defendant shall not be twice put in jeopardy of life or limb for the same offense, is to be his protection, as argued by his counsel, it is quite clear that a simple legislative enactment of the states cannot override or take away this protection, and the enactments referred to would be unconstitutional and void, and would form no basis for the decisions. While many courts, holding to the doctrine contended for by plaintiff in error, have based their argument,

to some extent, upon these constitutional provisions, we know of none holding the statutes authorizing a second trial upon the whole indictment void. Again, should we adopt the reasoning of the court in *People v. Gilmore*, *supra*, in holding that the statute meant only that the parties should be in the same position with reference to the *indicted issues* in the case, then the force of the statutes, as a basis for the decisions referred to, is swept away, and the courts of those states may, in effect, be ranked with those so holding, without the aid of a statute. With that view of the case, it might well be held, as in the case last referred to, that the statute gave no authority for the decision.

So far as the provision of the constitution of the United States may be invoked, we think it as pretty well settled now that that provision governs the court existing by virtue of the laws of the United States, and has no application to the state courts. *U. S. v. Keen*, 1 McLean, 438; *Barron v. Baltimore*, 7 Pet., 243; *Twitchell v. Com.*, 7 Wall., 321; *State v. Wells*, 46 Iowa, 662; *Fox v. Ohio*, 5 How. (46 U. S.), 410. We hold, therefore, that the plaintiff in error was properly put on trial for murder in the first degree, the granting of a new trial having the effect of setting aside all the results of the former trial.

It is next contended that the court erred in overruling the challenge of plaintiff in error to a juror, J. W. B. McAllister, for cause. The examination of this juror was quite extended by counsel on both sides as well as by the court, and it could serve no good purpose to transfer it to this already lengthy opinion. It is sufficient to say that if the juror had formed an opinion as to the guilt or innocence of plaintiff in error, it was solely upon reading newspaper reports published at the time of the homicide, of the truth or falsity of which he had no opinion, and upon which he seemed to base whatever opinions he had, if any existed. The opinion of the juror was clearly a hypothetical one, and could in no way disqualify him. *Curry v. State*, 5 Neb., 415; *Murphy v. State*, 15 id., 385. The examination made it clear that the juror did not desire to sit in the case, and would have been pleased if excused. Yet his answers were doubtless conscientiously given. During the examination by the court he was asked if, notwithstanding what

he had heard and read, he could sit as a fair and impartial juror and render a verdict according to the law and evidence. His answer was: "I shall have to answer as I did Judge Mason; I don't know enough to swear I could not." *The Court.* "I ask you if, sitting as a juror in this case, you could render a verdict according to the law and evidence as it shall be given you on the trial of the case?" *Answer.* "Well, sir, I guess that I could; I don't know. I am very sorry I have been brought into this case in some way. I am sorry I am troubled in this way. At the same time I would not like to have to reply—to swear. I don't know enough to say—cannot tell. The newspapers—" *The Court.* "How?" "I don't know anything further except what I read, and didn't form an opinion, as I know, as to whether they were right. We take the *Omaha Herald* and *Lincoln* papers and local papers, and I don't know whether they were right or wrong. That's as far as I can tell you. . . ." *The Court.* "You have no impression as to whether he is guilty or not of the crime?" *A.* "Yes, necessarily some impression, or it would not have been in the newspaper." *The Court.* "You have an impression a man was killed?" *A.* "Yes, I have an impression a man was killed." *The Court.* "You have an impression a man killed him?" *A.* "Yes." *The Court.* "Whether or not it was excusable you have no impression?" *A.* "No." *The Court.* "Then it would not take evidence to remove that?" *A.* "No, it would not."

While the examination of the juror was at times not very clear, yet on the whole examination he shows himself to be a competent juror, and the court did not err in retaining him.

The next and last error complained of is the alleged misconduct of counsel for the state while making the closing argument. This alleged misconduct consists in going outside the record, and referring to the Cincinnati riots, which had occurred a few days before the trial. The record discloses the fact that counsel for plaintiff in error had to some extent gone outside of the evidence in his very able argument to the jury, and that the allusion to the Cincinnati riots by the state's counsel was in reply to what had been previously said, and for the purpose, as stated, of illustration. While counsel for the state especially should at all times avoid going outside of

the record, and while, in a case of this importance especially, we should be in favor of a strict enforcement of the proper rules governing arguments to juries, yet it is impossible for us, in the light of the almost uniform decisions of this court, to say the trial court erred in the matter referred to. We are informed by the record that during the argument of Mr. Watson, when he referred to the Cincinnati riots, the attorney for plaintiff in error said: "I desire to object to the discussion of the Cincinnati riots." *Watson*. "I simply refer to it in illustration. I heard counsel state worse." *The Court*. "It is not —" *Mason*. "Note an exception." There was no ruling of the district court adverse to plaintiff in error or otherwise. In *Bradshaw v. State*, 17 Neb., 147, a similar question was before this court, and it was held that "before a case can be reversed and a new trial ordered, it must appear that the court before whom the accused was tried erred, and that such error was prejudicial to the party on trial. The practice in this state is now settled in this respect, and before this court can review questions of this kind, the attention of the trial court must be challenged by a proper objection to the language, and a ruling had upon the objection. If the language is approved by the court, and the attorney is allowed to pursue the objectionable line of argument, an exception to the decision can be noted." There being no ruling of the court, we cannot say the court erred. The question did not afterwards arise, as the line of argument objected to was abandoned.

We find no error in this record. The judgment of the district court is therefore affirmed.

NOTE.—It is seldom one finds a case where the judge evinces so much industry and skill in the citation and discussion of authorities in order to sustain a conviction as is exhibited by the learned judge who prepared the above opinion. Neither in the opinion nor the statement of facts in the 15th of Nebraska, where the case is first reported, or in the 18th of Nebraska, where the above opinion is found, is there any reference to the facts connected with the murder, and, as the man was convicted of murder in the second degree only upon his first trial, it is safe to assume that it was an ordinary and not a blood-curdling and atrocious murder case. It appears from the report of the case in the 15th Nebraska that the defendant interposed a plea in abatement to the indictment, this plea being to the effect that the grand jury was illegally drawn. To the facts set forth in the plea the district attorney interposed a reply, and although the pleadings, as said by the court, "were somewhat crude, they present an issue of fact squarely

as to whether the list of jurors was properly selected. And on this issue the prisoner had the right to produce the evidence he offered and be heard," etc. For the error of the court in denying the defendant a trial on the issue of fact so made the cause was reversed and remanded by the supreme court for a new trial. After the cause was remanded the venue was changed from Lancaster to Otsego county, but the second trial was heard before the judge who presided at the first. With all due deference to the learning, logic and industry of the court, we think that, aside from the authorities, upon reason and common sense, the plea of former acquittal on the charge of murder in the first degree ought to have been sustained. When a man is placed upon trial for his life before a jury, and is acquitted of the higher degree of homicide, and convicted of the less degree, that verdict should shield him from being punished for the offense of which he was acquitted, whether sustained or set aside. The verdict of the jury is always recorded when announced in open court. It then becomes a part of the record in the cause. And while it may be annulled by the court in granting the accused a new trial, the verdict still remains on record as an acquittal of the higher offense, in contemplation of law—as much a verdict of acquittal as if no motion to set it aside had ever been entered. The defendant in an indictment for murder is charged with the crimes of murder and manslaughter in as many degrees as there are in these crimes, as graded by the legislature. It is said that the single act of killing does not consist in several crimes, and that, if the indictment be for murder in the first degree, the defendant may be convicted of any lower degree of homicide. It may well be doubted whether the different degrees of homicide ought not to be charged in separate counts; but, admitting that this question is at rest, and no longer open to discussion, would it be contended that if the indictment should contain separate counts charging the defendant with murder in the first and second degrees, and the verdict of the jury were "not guilty" as to the first count (charging murder of the first degree), and "guilty" as to the second count (charging murder of the second degree), the defendant could again be placed upon trial for murder of the first degree on the first count? The defendant had been fully acquitted of the offense charged against him in the first count, and illegally, and through the misdirection of the court, found guilty of the offense preferred against him in the second count. Why should he be compelled to forego the right to move for a new trial in order to be relieved from the illegal conviction? It would be dangerous to establish the doctrine that a man must undergo the illegal imprisonment to which he is subjected through the ignorance or stupidity of the trial judge, or forfeit the constitutional protection of not being twice placed in jeopardy for the same offense, by asking to be relieved of the illegal restraint. Why should he be held to waive his constitutional rights by asking something of which the law guarantees him the right—a fair and impartial trial conducted in accordance with the forms of law? He is not entitled to a new trial by the mere asking for it, but is granted it because it is his right under the law to have it. He does not ask to have the verdict set aside as to the charge for which he was acquitted, but merely asks that it be annulled as to the charge of which he was illegally found guilty. With all due deference to the court, the case of *Lesslie v. State*, 18 Ohio St., 330, cited in

support of the decision, is not in point. In that case the indictment contained three counts for murder of the first degree, and these counts charged the offense in different forms so as to meet the evidence. On the first trial the accused was found guilty of murder of the first degree, as charged in the first count, and when that verdict was set aside the case remained the same as if no trial had taken place, since each count charged murder of the first degree. On the second trial he was found "guilty of manslaughter as charged in the third count of the indictment, and not guilty as charged in the first and second counts of said indictment." Leslie moved that he be discharged for the reason that, on the first trial, he was found guilty of murder in the first degree as charged in the first count of the indictment, and not guilty as charged in the second and third counts, etc. The motion was overruled, and properly so, and it needs no extended course of reasoning or learned discussion to show that the ruling of the court is right, since the first verdict found him guilty of murder as charged in the first count, and not guilty of murder as charged in the second and third counts. Besides, the jury did not say by their verdict that defendant was not guilty of *manslaughter*, as charged in the second and third counts. If upon the second trial the jury had found the defendant guilty of murder as charged in the second and third counts of the indictment, the case might serve as a precedent; but upon its facts, it falls far short of being in point. Where all the counts are for murder in the first degree, and the defendant is convicted of that crime on any of the counts, if the conviction be set aside, there can be no good reason why he should not again be placed upon trial on all the counts, just the same as if no trial had taken place. Having been convicted of the higher degree of the crime, he cannot say that he is in any worse position on the second trial than on the first. As the different counts are inserted to meet the evidence, it may with propriety be said that when the first verdict is set aside the second trial should proceed the same as the first. Even in cases where all the counts are for murder in the first degree, and the defendant is convicted in the second degree on one of the counts, there can be no good and controlling reason why he should not, after the verdict is set aside, be placed upon trial for murder in the second degree or manslaughter, as the case may be, on all the counts. Under such circumstances the defendant could not show that he was deprived of any constitutional right, for the verdict of guilty of murder of the first degree or manslaughter on the first or any other count, and not guilty as to the other counts, would mean nothing more than that, in the judgment of the jury, the evidence offered applied more directly to the count upon which the conviction was had than to the other counts. The case of *The State v. Behimer*, 20 Ohio St., 572, was removed to the supreme court upon exceptions taken by the state's attorney to the decision of the trial court in sustaining the plea of former acquittal of murder in the first degree interposed by the defendant, and he could not be affected by the decision of the supreme court on the question, whatever way it might decide. The case is one in point, however, for what it is worth.

The case of *People v. Keefer*, *supra* (S. C., 5 Am. Cr. Rep., 6), is mere *dicta*, because in that case the defendant was convicted of murder of the first degree on both trials, and the court simply held that, having been con-

victed of murder of the second degree, he could not be prejudiced by the refusal of the court to charge as requested by defendant, that "defendant having been previously tried on this indictment and found guilty of murder of the second degree, he cannot now be convicted of murder in the first degree."

With reference to the constitutional question involved it is only necessary to suggest that the decisions referred to have reference to the fifth amendment to the constitution of the United States. Until the adoption of the fourteenth amendment to the United States constitution, the subject to which it relates was wholly within the jurisdiction of the states.

The fifth amendment to the constitution of the United States provides that "no person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury; . . . nor shall any person be subject, for the same offense, to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation." But, notwithstanding this constitutional guaranty of personal rights and security to property, the state might deprive its own citizen, or any person within its jurisdiction, of life, liberty or property in any mode or by any form of law enacted by its legislature and sanctioned by its courts; and, however tyrannical, cruel and unusual the punishment, or unjust the decree which deprived him of his life or liberty, or despoiled him of his property, might be, yet he was without the protection of the federal constitution.

But since the adoption of the fourteenth amendment, it is conceded, even by the courts of the southern states, that when by the necessities of the case it is called into requisition, it is intended to obliterate all state lines and judicial boundaries. In a word, as the fifth amendment is a restriction upon the federal government, the fourteenth is a restriction upon the state governments.

PEOPLE V. BEZY.

(67 Cal., 223.)

MURDER: Evidence — Threats — Character of deceased — Practice — Opening statement of counsel.

1. **EVIDENCE OF THREATS.**— While threats against the deceased are admissible in evidence in a trial for murder, to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased.
2. **EVIDENCE OF CHARACTER — ADMISSIBILITY OF.**— On trial for murder, evidence is admissible as to general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue.

3. EVIDENCE OF CHARACTER OF DECEASED.—On trial for murder it is error to permit the prosecution to give evidence as to the character of the deceased for peace and quietness.
4. OPENING STATEMENT BY COUNSEL.—It is not error nor abuse of discretion in criminal trial for court to restrict counsel for defendant in the opening statement to stating what he expects to prove, without any argument upon such facts.

Appeal from a judgment of the Superior Court of the County of Fresno, and from an order refusing a new trial.

Attorney-General Marshall, for respondent.

W. D. Tupper, for appellant.

THORNTON, J. The defendant was accused of the murder of John Mengetti, and on his trial the court admitted evidence, against objection, of certain threats made against Joe Mengetti. Joe Mengetti was the brother of the deceased, and the evidence shows that they lived together, and were cousins and neighbors of defendant. While threats against deceased are admissible in evidence to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. We are of opinion that the circumstances under which the threats were made are not sufficient to show such connection as justified the admission of the evidence. It may be said that the evidence was admissible as to the general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue. We think the court fell into an error in admitting the evidence above referred to, and as it is not clear that this testimony did not operate prejudicially to the defendant, we are of opinion that it must cause the reversal of the judgment and the order denying the motion for a new trial. There was also evidence of threats (in Julius Hedrick's testimony) against the Mengettis, which we think was admissible.

The court erred in permitting the prosecution to give evidence as to the character of the deceased for peace and quietness. *People v. Anderson*, 39 Cal., 704. The court committed no error or abuse of discretion in restricting counsel for defendant in his opening statement to stating what he expected to prove, without any argument upon such facts. *People v.*

Anderson, 44 Cal., 65. The counsel had abundant opportunity in the course of the trial in suggesting and arguing all points of law pertinent to the cause.

For the errors above pointed out the judgment and order should be reversed, and the cause remanded for new trial; and it is ordered accordingly.

MYRICK, J., and SHARPSTEIN, J., concurred.

PEOPLE V. NEASON.

(67 Cal., 225.)

BURGLARY AND LARCENY — PROOF OF PRIOR CONVICTION OF PETIT LARCENY. — Where the defendant was charged in the information with burglary and a prior conviction of petit larceny, and was convicted of burglary in the first degree, but was allowed to plead guilty to the charge of prior conviction without evidence or verdict thereon, and was thereon sentenced to fifteen years' imprisonment, there is no error, as the defendant might have been sentenced to such imprisonment without consideration of the charge of petit larceny.

Appeal from a judgment of the Superior Court of San Diego County.

Attorney-General Marshall, for respondent.

Leach & Parker, for appellant.

MYRICK, J. The defendant was accused by information of the crime of burglary, and was convicted of burglary in the first degree, and sentenced to fifteen years' imprisonment in the state prison. The information contained a charge that the defendant had been previously convicted of petit larceny. One point only is presented on this appeal, viz.: The defendant, being charged with having suffered the previous conviction of petit larceny, was allowed to admit and plead guilty to that charge, and no evidence was introduced to prove the same, nor any verdict rendered thereon. The defendant refers to the decision of this court in *People v. King*, 64 Cal., 338, as authority that the proceedings in this case show error. The difference in the two cases is this: In *People v. King* the defendant was accused

of the crime of petit larceny and a former conviction of felony, in which case the conviction for petit larceny would not justify imprisonment in the state prison unless the proceedings as to the former conviction were regular; while in the case before us, upon conviction for burglary in the first degree, the defendant might have been sentenced to fifteen years in the state prison, independent of the former conviction for petit larceny. The proceedings in this case as to petit larceny may be laid aside and the judgment stand, no error appearing.

Judgment affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

STATE v. JUSTUS.

(11 Or., 178.)

MURDER: *Indictment — Unauthorized person before grand jury — Motion to quash evidence — Motion in arrest — Non expert — Experiments — Manslaughter.*

1. INDICTMENT — UNAUTHORIZED PERSON BEFORE GRAND JURY.— The presence of a person before the grand jury who is not authorized by law is highly improper, and must be taken advantage of by motion to quash before trial. After verdict the motion should be in arrest of judgment.
2. EVIDENCE — NON-EXPERT.— One not a surgeon or expert is not competent to testify as to effect of gunshot wounds on a trial for murder by shooting.
3. EXPERIMENTS.— Experiments to be admissible as evidence must be shown to have been made under conditions the same as those existing in the case on trial.
4. ACCIDENTAL HOMICIDE — MANSLAUGHTER.— Where one accidentally killing another is culpably negligent he is guilty of manslaughter.¹

Appeal from Jackson County.

R. Williams, B. F. Dowell and J. R. Neil, for appellant.
P. P. Prim, for respondent.

LORD, J. The appellant was indicted by the grand jury of Jackson county for the crime of murder in the first degree, committed by shooting and killing William Justus, his father.

¹ See note.

for which he was tried at the June term of the circuit court of that county, and found guilty as charged and sentenced to be hanged. From that judgment he brings his appeal to this court. Among the errors relied upon to question the correctness of that judgment and secure a new trial is the fact, as disclosed by the record, that a person not authorized by law was present before the grand jury, at the request of the district attorney, for the purpose of assisting them in the examination of witnesses and in framing the indictment. That any person other than the district attorney should be permitted to be present during the sittings of the grand jury must be admitted to be highly improper. "No person other than the district attorney," is the emphatic language of the statute, "can be allowed to be present during the sittings of the grand jury." But *non constat* that the error is fatal. In *State v. Whitney*, 7 Or., 356, it was held, on a motion to set aside an indictment involving this identical question, that it was only the two cases enumerated in subdivisions 1 and 2 of section 115 of the Criminal Code for which such a motion was available. "These," say the court, "are the only two cases for which an indictment can be set aside; and as the section prohibiting any other than the district attorney from appearing before the grand jury is not in chapter 7, there was no error in the ruling of the court." "But irregularities in the proceedings before the grand jury," says Mr. Bishop, "may under some circumstances be taken advantage of upon a motion to quash the indictment." But a motion to quash must be made at an early stage in the case, for it is inadmissible after verdict, as then the motion should be in arrest of judgment. 1 Bish. Crim. Proc., §§ 747, 748, 762. In *Durr v. The State*, 53 Miss., 425, where the court permitted an attorney who had been employed to assist in a prosecution to go before the grand jury with the witnesses, and there act for the district attorney in framing the indictment, it was considered doubtful whether the objection could be raised by motion to quash the indictment, the court saying: "We regard it as bad practice, and certainly as being much more appropriately done by plea in abatement." But a plea in abatement does not answer to the charge made by the indictment, but it declines to answer it on the ground that the charge is not legally made. Bac. Ab., Juries, A. And if the

objection is not made at an early stage of the proceedings it will be considered as waived; for, as was said in *The State v. Carver*, 49 Me., 593, by pleading generally to the indictment the defendant admits its genuineness and waives all matters that should have been pleaded in abatement. *The People v. Robinson*, 2 Park. C. R., 235, 309. Now, here the objection comes for the first time after trial and verdict upon a motion for a new trial. At most, it is but an irregularity, but of that character which does not bring into question the qualifications of the grand jurors or their fairness towards the accused. Nor is it claimed that any injustice or wrong was done to the prisoner by reason of this alleged error at the trial. Upon authority it is clear the objection cannot prevail.

The next assignment of error is the overruling the objection of the appellant to the admission of certain pasteboard targets as evidence. It appears by the bill of exceptions that one James Birdseye, by direction of the coroner, and in the presence of the coroner's jury, made several experiments with the gun with which the defendant claimed he had accidentally killed his father, by discharging it at certain targets made out of pasteboard, at different distances respectively marked upon them. The coroner, Mr. Huffer, being on the witness stand, the prosecuting attorney, in the presence of the jury, exhibited to him these targets, to the admission of which the objection was made, which he identified, and further testified as follows: that "he saw the defendant's gun tested at different distances, and that the distances were marked respectively on the targets; that he saw the gun loaded when the experiments were made; that the loads of powder were a charger full, and that the charger was the one on the pouch used by the defendant." Birdseye, who had loaded and fired the gun, testified:

"I loaded the gun, using the powder-flask which the defendant said he loaded from when he killed his father. I filled the charger level full each time I loaded the gun. The distances on the targets are all correct."

At the coroner's jury the defendant had testified, among other things, that he had taken the gun at the suggestion of his father and had gone out and shot a squirrel the dogs had treed. He says:

"I started from the front porch to put the gun away; I

came in near the door or through it to put the gun away; we generally keep the gun sitting behind the partition door on a stand table. I was in here, and had just started in, the gun being cocked. If I remember rightly, I had the gun lying across my left arm, and I started across the floor to put it away, it being cocked. I went to let the hammer down. I don't know whether or not I had hold of the hammer. I went to let the hammer down, and touched the trigger, I suppose, before I got hold of the hammer, and the gun went off. I was about six feet from the door when the gun went off; this is, I think that was the distance. I suppose it is about the same distance to where my father was sitting in the chair when the gun went off."

With this explanation we now come to the pasteboard targets which were admitted in evidence against the objection of the defendant. Their object was to rebut the defense of accidental killing by showing that the statements of the prisoner upon which this defense was based were inconsistent with what it was claimed the inferences from the target experiments would prove to be the circumstances of the case. As no one was present except the prisoner when the deceased was killed, and as his statements were inconsistent with the theory of a "near" gunshot wound, which the prosecution claimed was the cause of the death, the object of the experiments made on the pasteboard targets which were offered in evidence was to prove by inference that the deceased came to his death by a near gunshot wound in the hands of the defendant. This was the vital question involved in the issue and to which the evidence excepted to was directed. But here it must be noted that the witnesses who made these experiments were not experts, and were therefore unable to express an opinion whether the phenomena indicated by near gunshot wounds upon the human body corresponded in appearance with the phenomena exhibited as the result of their experiments, thereby connecting the similarity of the fact offered to be proved with the fact in issue; but it was proposed to show only the phenomena produced by near gunshots on the pasteboard targets, from which it was claimed the jury were qualified and authorized to infer similar phenomena would be produced by near gunshot wounds on the human body, and which, as a result of such in-

ferences, would serve to illustrate the gunshot wound from which the deceased died, and thereby establish the point in issue that the deceased was killed by a near gunshot wound. Is the evidence of such experiments admissible for the purposes claimed? Gunshot wounds belong to a branch of medical science, and often give rise to many questions of a difficult nature, although, generally, a gunshot wound is easily distinguished. And among the questions frequently arising is, was the ball fired near the deceased or from the distance? Observation and study, however, in this department of science have noted and described with much exactness the appearance and character of gunshot wounds. In "near" wounds, as they are termed, when the muzzle is placed near the surface of the body of the deceased when fired, the characteristics of the wound are thus described: (1) A superficial bluish color of the skin from the contusion caused by the explosion. (2) Particles of charcoal and ignited powder imbedded in the skin. (3) Slight burning. (4) Coagulation of blood mixed with powder on the lips of the wound. If the muzzle is placed in direct contact when exploded, the wound is large and circular, the skin denuded, blackened and burned, and the point at which the ball entered is livid and depressed. *Dearn. Med. Jur.*, 241; *Whart. & Stille's Med. Jur.*, 707; *Tayl. Med. Jur.*, 329; *Beck, Med. Jur.*

Now, it must be manifest that there are here noted so many marked characteristics of near gunshot wounds which could by no possibility be reproduced, or represented by experiments upon pasteboard, yet upon which the fact of a near wound is made to depend, and often to be determined, that it would be utterly unsafe to apply the inferences sought to be deduced from such experiments to the fact in dispute, unless there can be found in such experiments, and the subject-matter which it is their object to explain or illustrate, some point of similitude or ground of common resemblance, always present, as a result induced by a similarity of conditions or circumstances. It may be suggested that some identity of resemblance may be traced in the powder-burns exhibited by the experiments as the result of near shots and in the wounds of the deceased which the medical authorities indicate are usually if not always present in "near" wounds. But when, as here,

the case is not susceptible of direct proof, and the fact in issue — whether the ball was fired near or from the distance — depends of necessity for a correct determination upon the appearance of the wound, the fact, and its experienced consequences, does not belong to the ordinary information of men, but lies within the limits of a particular branch of medical science, and requires to be proved by persons skilled in it, the better to enable the jury to reach a safe conclusion. In *Rush v. State*, 61 Ala., 89, it was held that one not a surgeon or expert, although he had been in war and seen the range of balls in gunshot wounds, was properly excluded from testifying on a trial for murder by shooting. It would seem, then, hardly to be safe to permit non-professional witnesses to prove, through the instrumentality of experiments, matters not within the range of their observation and experience, and of which they are supposed to be incompetent to deal. But besides this, when it is considered how much other marked characteristics in conjunction with powder-burns aid in determining the fact of near wounds,— what seemingly immaterial circumstances,— even the kind or compound of the wadding used, may affect the appearance of gunshot wounds, how fundamentally different is the human body in nature and texture from the substance upon which the experiments were made; and when it is considered how important it is that experiments should be based on conditions and circumstances as nearly as possible like the matter they are intended to illustrate to avoid the liability to misconception or error from some supposed agreement or resemblance, we should certainly hesitate to admit such experiments as evidence, unless supported by reason or sanctioned by authority.

In *Commonwealth v. Piper*, 120 Mass., 188, it is held that, unless the experiments are shown to have been made under conditions the same as those existing in the case on trial, the tendency is to confuse and mislead the jury. *Eidt v. Cutler*, 127 Mass., 523. And in all the cases which have come under our observation, where such evidence has been held as admissible, the experiments were made with like means on the same kind of stuff or substance, or were based on a similarity of conditions or circumstances, whereby the results produced betray, with some certainty and uniformity, a common similitude or

agreement, and as a consequence thereof furnish a safe foundation for inference, or the truth of the matter sought to be established. In *State v. Blair*, found in the notes to Whart. Crim. Ev., § 312, the experiments admitted in evidence were made with the same kind of pistol on the same kind of stuff as that of which the outer garments of Armstrong, the person shot, were made. But in *Com. v. Twitchell*, 1 Brewst., 566, where the object of the experiments was to ascertain the facility of breaking a human skull with a poker, and the witness testified that he had made experiments upon another skull with a poker like the poker with which the skull of the deceased had been broken, the evidence was rejected. In *Smith v. State*, 2 Ohio St., 513, the evidence of the experiments, which was decided ought to have been admitted, showed the experiments to have been made under similar conditions and like circumstances to the act in issue. Again, in *Sullivan v. Com.*, 93 Pa. St., 285, the deceased was shot through her gown in the abdomen, and the experiments were made by a physician upon similar stuff with the same pistol loaded with cartridges out of the same box, who, at the trial, was called as an expert to show the effect of powder marks where a pistol is fired at short range, and it was held that his testimony, and the muslin used in his experiments, were admissible. But even if it be considered a matter of doubt whether the evidence objected to was proper or otherwise, we should feel bound *in favorem vite* to hold that in this case it was inadmissible, as it was pressed by the state as of vital consequence.

The next assignment of error is the refusal of the court to give an instruction asked for by counsel for the defendant to the effect that if there was a reasonable doubt in the mind of the jury as to whether the killing was done purposely and of deliberate and premeditated malice, or accidentally, they should give the benefit of that doubt to the prisoner and find him not guilty. The error alleged to be in such an instruction is that the jury might believe the killing to have been accidental, and still consistently found the defendant guilty of manslaughter. In *The State v. Hardie*, 47 Iowa, 647, it was held: (1) That if one use a dangerous and deadly weapon in a careless and reckless manner, whereby another is killed, the party so using the dangerous weapon is guilty of manslaughter, even though no

harm in fact is intended. (2) That the degree of care in one handling a dangerous weapon is not the highest degree of care and prudence, but only such care as a reasonably prudent man would exercise under like circumstances. To the same effect is *Chrystal v. Com.*, 9 W. P. D. Bush. R., 761, in which the court say: "It is insisted for the appellant, with force and plausibility, that if, when he discharged the pistol, he did not intend by having it in his hands to discharge it, or to do any unlawful act with it, his accidental killing of Ott could not have amounted to a felony, however gross may have been his carelessness in the use of the weapon; and we are referred to the case of *Golliher v. Com.*, 2 Duv., 163, as sustaining this argument. But after a careful consideration of the question we are unable to find in the case cited, or any other decision of this court, any departure from the general rule, when applied to a case like this, that "whatever may be the difference as to degrees of homicide, a party whose negligence causes the death of another is in like manner responsible, whether the business in which he is engaged was legal or illegal. If the business was of such a character as to be felonious, the offense, it is clear, is murder. But even where the business is perfectly legal, negligence in the discharge of it, when producing homicide, is manslaughter." To this general rule there may be exceptions, as where an act careless in itself is committed with fatal results, under circumstances or at a place at which it might be inferred that no injury could happen from the carelessness of the party acting.

There was no error in this assignment; but from the views before expressed, the judgment must be reversed and a new trial ordered.

NOTE.—See *Reg. v. Franklin*, 5 Am. Cr. R., 377.

PEOPLE v. ROBERTSON.

(87 Cal., 646.)

MURDER: Killing — Mutual combat — Justification — Malice — Self-defense — Witnesses.

1. **MUTUAL COMBAT NO JUSTIFICATION OR EXCUSE.**— A homicide will not be justified nor excused, nor even mitigated, by the mere fact, of itself, that the deceased and the defendant were in actual combat at the time of the homicide. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place. If it appears that a person, armed with a deadly weapon, on being assaulted, takes advantage of the assault to kill his assailant, and, in execution of his purpose, does kill him, not in the heat of passion caused by the assault, nor in reasonable self-defense, it is murder.
2. **MALICE.**— If the facts following the assault show that from the outset of the combat following the assault the words and acts of defendant show an intention to kill his assailant under color of the assault, it is murder; and the sufficiency of the facts to prove the existence of malice is a matter for the jury.
3. **SELF-DEFENSE — DECLINING FURTHER COMBAT.**— A killing is not in self-defense if the defendant, having the opportunity to decline further combat in good faith, instead, continues the struggle or renews the affray, the result of which is the homicide.¹
4. **INSTRUCTIONS.**— Refusal to give instructions, given in substance, is not error.
5. **WITNESSES.**— It is not error to deny a defendant's motion, in a prosecution for murder, after the prosecution has rested, to order the prosecution to call and examine as witnesses certain persons said to have been present at the time of the homicide.

Appeal from a judgment of the Superior Court of the County of Mendocino, and from an order refusing a new trial.

J. A. Cooper, J. Q. White and J. M. Mannon, for appellant.
Attorney-General Marshall, for respondent.

McKEE, J. Defendant was convicted of murder in the second degree, and sentenced to ten years in the state prison. On this appeal from the judgment and an order denying a motion for a new trial, it is contended:

1. That the verdict is not supported by the evidence.

The evidence shows that defendant, on the 24th of August, 1884, twice stabbed one A. Davis with a butcher knife. In one of the stabs, the knife was driven into his body, between

¹ See note.

the fifth and sixth ribs, upwards and forward towards the heart, the point of the knife penetrating the heart, causing almost immediate death. The stabbing was done in the excitement of an angry quarrel and scuffle, which originated in an attempt by the defendant and two others to buy a watermelon at a store in the town of Covelo kept by the wife of Davis. Davis himself was in charge of the store at the time, and when the parties asked him to sell them a watermelon on credit, he told them he had no watermelons to sell on credit, and to go along about their business. They did not leave. Defendant refused to go, saying he would do as he pleased, and commenced to abuse Davis with opprobrious and threatening language. In these circumstances, Davis picked up an iron-hooked stick, six or seven feet long, which was used in the store for bringing down buckets and things from hooks on which they hung, and with the end of the stick he "poked and punched" the defendant, who fell on the porch of the store. The defendant got up, and, instead of going away, turned upon Davis, who was standing inside the store, and Davis again used the stick to "punch" him; but the defendant got hold of the stick, and Davis, in trying to jerk it away from him, jerked him inside the store, where, in the struggle over the stick, defendant continued to curse and swear at Davis, and threatened to kill him. In these circumstances the wife of Davis stepped in between the two, and ordered her husband to go to the back part of the store, and the defendant to go away. But neither let go the stick, and the defendant struck at Davis, past the woman, cutting one of her fingers in the act. The blow caused Davis to stagger and cry out that he was cut. In the act of staggering he let go the stick and picked up an ax-handle, which he raised as in the act to strike, when the defendant closed with him, stabbed him again, and shoved him against a show-case on the counter of the store, where he fell and died with the defendant atop of him. Defendant immediately arose from the body, walked out of the store and across the street to a saloon, where, as a witness expresses it, "he laid right upon a card-table in the saloon, turned one leg upon it and pulled out his knife, on the blade of which there was blood all the way up to the hilt, and said, 'I have been epaying or slaying the s—— of a b——.'"

In his own behalf the defendant testified:

"Deceased got mad about something I said about the melon, and jumped down and got this rod, and called me a d—— of a b——, and punched at me with one end of the rod. He then turned the rod and punched at me with the other end, and knocked me down. While I was getting up he got an ax-handle and hit me; the second time he hit me I caught the handle, and he jerked me inside the store; he jerked away from me in the store, and started to hit me again with it. I ran in under him then and cut him. As soon as I could get him to let loose of me, I walked right out and went over to Mr. Montague's. He hit me in the stomach with the stick, and knocked me down on my back."

This evidence, it is argued, proves that the killing was done in the heat of blood, upon provocation, and without malice, and that it amounted to manslaughter only, and not murder. But the conduct of the defendant in connection with the homicide, his persistent threats to kill Davis, the use of a deadly weapon in killing him, and his bravado immediately after the killing, are things which do imply malice in them. Their sufficiency as evidence to prove the existence of malice was matter for the consideration of the jury; and as the jury found from them that the defendant unlawfully killed the deceased in malice, and not in the heat of passion caused by the assault made upon him by the deceased, it cannot be said, as matter of law, that the evidence was insufficient to support their verdict. The mere fact that the deceased and defendant were in actual combat at the time of the homicide does not, of itself, mitigate the homicide, or justify or excuse it. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place, as proved by the testimony on the part of the prosecution or of the defendant. And it is well settled, if the circumstances show that a person armed with a deadly weapon, on being assaulted, takes advantage of the assault made upon him to kill his assailant, and does, in execution of his purpose, kill him, not in the heat of passion caused by the assault, nor in reasonable defense of himself against the assault, it is murder. 2 Bish. Crim. Law, 736. It is also well settled that if the circumstances of a combat following an assault show that from the

outset the words and acts of the defendant indicated an intention to kill, or to take his assailant at an unfair advantage to kill him under the color of the assault, it is murder. 1 Russ. Cr., pp. 527, 532, 585, 592; 2 Whart. Crim. Law, §§ 953, 955, 987, 996.

2. The next assignment of error is that the court instructed the jury as follows:

"Before the defendant can claim that he was acting in self-defense it must appear that the defendant must really and in good faith have endeavored to decline any further struggle before the homicide was committed. And in this case, if you believe from the evidence that the defendant was engaged in mortal combat with Davis, the deceased, and that the defendant did not really and in good faith endeavor to decline any further struggle before the homicide was committed, if one were committed, then, and in such case, the defendant cannot avail himself of the plea of self-defense."

The proposition is that if a person is assaulted by another, with whom he engages in a combat, he must really and in good faith endeavor to decline any further struggle before taking the life of his assailant. According to the common law it is the duty of a person assaulted to give way "as far as the fierceness of the assault will permit him." 1 Hale, P. C., 483. But if the assault be so fierce as not to allow him to yield a step without manifest danger of his life or great bodily harm, then, in his defense, he may kill his assailant instantly; and this, says Blackstone, "is the doctrine of universal justice as well as of the municipal law." 4 Bl. Comm., p. 185. Upon that principle are founded the provisions of our Penal Code on the same subject. Section 197 of the code in effect declares that if a person is assaulted in such a way as to give him ground, as a reasonably prudent man, in the condition in which the assault places him, to apprehend a design on the part of the assailant to commit a felony upon him, or to do him some great bodily harm, he has the right instantly to defend himself, and, if necessary to prevent such real or apparent danger to his person, to kill his assailant. Real or apparent danger, or danger imminent and immediate to life or limb, is therefore a sufficient condition in which to exercise the right of self-defense. No withdrawal or retreat is required. So assailed, a

person has a right to stand his ground, and, if necessary in defense of himself, slay his assailant. But necessity, real or apparent, for taking human life, arising out of the circumstances in which the homicide is committed, must exist, and the person himself must be without fault. "The weight of authority," says the supreme court of Indiana, "establishes the doctrine that when a person, being without fault and in a place where he has a right to be, is violently assaulted, he may, without retreating, repel force by force; and if, in the reasonable exercise of his right of self-defense, his assailant is killed, he is justifiable." *Runyan v. The State*, 57 Ind., 84; 1 Bish. Crim. Law, § 865.

In this case, according to the evidence, the defendant was not conducting himself lawfully. He should have left the store when he was told to go. He had no right to remain and abuse the person in charge of the same with opprobrious epithets and threats to kill. Being where he had no right to be, and doing what he had no right to do, he was not without fault when Davis assailed him in order to compel him to go away. Nor did the nature of the assault upon him endanger his life or limb. There was no time, from the commencement of the affray to the time of the stabbing, when he could not have withdrawn without danger. That being so, the necessity for taking the life of his assailant did not exist, except by his own creation; for, when he got up from the porch where he had fallen, he could have gone away out of danger; but he turned upon Davis, and, engaging him in a struggle over the stick with which Davis had been prodding him, forced him inside the store and killed him. When a killing takes place under such circumstances, it is true, as matter of law, that the slayer should, really and in good faith, have endeavored to decline any further struggle before the homicide was committed. Pen. Code, subd. 3, § 197.

3. The giving of the following instruction to the jury is also assigned as error:

"If the jury believe from the evidence that there was first an affray on the porch of the store, and that the deceased pushed the defendant down with the iron hook, and that then the deceased returned to the store, and the affray then ceased for a sufficient length of time for reason to have resumed its

sway, and the defendant had sufficient time to realize the situation before anything further was done by the contending parties, and that then the defendant went into the store and there attacked the deceased, and then killed him as charged in the information, and not in necessary self-defense, then I charge you that the defendant was not justifiable in inflicting the mortal blow."

It is said there was no evidence of a cessation of hostilities. But it does appear that when the defendant fell on the porch, Davis did not continue the assault upon him. There was, therefore, a pause in the combat, and to that phase of the case the instruction was applicable.

4. The refusal to give the ninth instruction, in a series of instructions which the defendant asked, did not prejudice the defendant, because the matter to which it related was substantially covered by the eighth instruction which the court had given to the jury at the defendant's request.

5. There was no error in the denial of a motion made by the defendant, after the prosecution rested, to order the prosecution to call and examine as witnesses in the case certain persons who were said to have been present at the time of the homicide.

Besides, the same persons were afterwards called and examined as witnesses by the defendant. We find no prejudicial error in the record. Judgment and order affirmed.

Ross, J., and McKINSTRY, J., concurred.

NOTE.—A man who is assaulted in his own house is not obliged to retreat, but he is not justified in taking life unless it is necessary to protect himself and his home. *State v. Middleham*, 62 Iowa, 150; *Roberts v. State*, 68 Ala., 156. Where parties fight and separate, and afterwards meet, and one slays the other, he is guilty of criminal homicide if he could, at any time from the beginning of the first to the end of the second difficulty, have reasonably withdrawn from or avoided the difficulty without immediate danger to himself, and one cannot set up self-defense until he has done everything reasonable in his power to prevent, abandon and decline any further contest with his adversary. *Dolan v. State*, 40 Ark., 454. Any one who brings on or provokes a personal encounter thereby disables himself from relying on the plea of self-defense in justification of a blow which he struck during the encounter. *Page v. State*, 69 Ala., 229; *State v. Johnson*, 76 Mo., 121. See elaborate note on self-defense, to *Panton v. The People*, 5 Am. Cr. R., 425.

CLARKE v. THE STATE.

(78 Ala., 474.)

MURDER: *Killing one person by mistake for another — Copy of indictment and special venire — Proof of venue — Evidence — Threats — Concealment — Flight — Witness — Cross-examination.*

1. **SERVICE OF COPY OF INDICTMENT AND SPECIAL VENIRE.**—When the record shows an order for the service of a copy of the indictment and of the special venire on the defendant (Code, § 4872), this court will presume compliance with the order, in the absence of objection in the court below founded on the want of it.
2. **PROOF OF VENUE.**—The sufficiency of the proof of venue cannot be considered by this court, in the absence of a ruling by the primary court, and exception duly reserved to it.
3. **KILLING ONE PERSON BY MISTAKE FOR ANOTHER.**—When one person is killed by mistake for another, the character of the offense is the same that it would have been if the fatal shot or blow had killed the person for whom it was intended.
4. **THREATS BY DEFENDANT AGAINST A THIRD PERSON.**—As a general rule, a threat by the defendant to kill some other person than the deceased is not admissible as evidence against him; but, in a case of mistaken identity, evidence showing malice on the part of the defendant towards the person for whom the deceased is supposed to have been mistaken, or threats made by him against that person, is relevant and admissible; yet the jury should be instructed to give no weight or consideration to such evidence, unless they are satisfied as to the fact of such mistaken identity.¹
5. **SUBSEQUENT THREATS.**—In such case, the fact of mistaken identity being established, proof of threats made by the defendant towards the person for whom the deceased was mistaken, and of a difficulty between them, subsequent to the homicide, is competent and admissible against him, in connection with the precedent threats and other circumstances, in determining the intent and motive with which the fatal shot was fired.
6. **FLIGHT, CONCEALMENT, ETC.**—Any conduct on the part of the defendant indicating a consciousness of guilt, such as flight, concealment, etc., being competent evidence against him as an implied admission, it is competent for the prosecution to prove that, when an officer went to the defendant's house to arrest him, and inquired for him, his wife asserted that he was not at home, when he was in fact in an adjoining room, and failed to discover himself; but the jury should be instructed to disregard the evidence, unless satisfied that the defendant heard and understood the purport of the conversation.
7. **IMPEACHING WITNESS.**—The credibility of a witness cannot be impeached by proof of the declarations of third persons, not made in his presence.

¹ See note.

8. DIFFICULTY BETWEEN DEFENDANT AND THIRD PERSON OR DECEASED.—The prosecution having proved the fact of a difficulty between the defendant and a third person, for whom the deceased was supposed to have been mistaken at the time of the homicide, the defendant cannot be allowed to prove the cause, merits or details of that difficulty.
9. TESTIMONY OF DEFENDANT AS WITNESS—CROSS-EXAMINATION.—When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness (Sess. Acts 1884-5, p. 139), he subjects himself to the test of cross-examination as to any matter connected with the transaction, or pertinent to the issue, and impeachment by evidence assailing his general character, or by proof of contradictory statements on other occasions; but he cannot be cross-examined, against his objection, as to his connection with or commission of other offenses, or matters which would unduly prejudice him in the minds of the jury,—as by asking whether he did not “belong to the Jesse James gang.”

From the Circuit Court of Jefferson. Tried before the Hon. S. H. Sprott.

The defendant in this case, Ralph Clarke, was indicted for the murder of James Leatherwood, by shooting him with a gun or pistol; and being tried on issue joined on the plea of not guilty, was found guilty of murder in the first degree, and sentenced to imprisonment in the penitentiary for life. The judgment entry shows that the defendant was regularly arraigned on the 25th May, 1885; that the court then made an order appointing the 28th May for his trial, directing the summoning of a special venire for his trial, and service of a copy thereof, with a copy of the indictment, on the defendant one entire day before the day set for the trial; and that on the trial, on the day appointed, no objection was raised on account of any failure to comply with this order; but it does not affirmatively show a compliance with the order.

It was proved on the trial that the deceased was shot, and instantly killed, on the night of November 6, 1884, while asleep in a bed in a room on the ground floor of a stable in the city of Birmingham; and the evidence tended to show that the fatal shot was fired through a crack in the wall of the room, on the side next to the street. One Pool was sleeping in the bed with him at the time, next to the wall, and two other persons were sleeping on the floor of the room; and a lamp was left burning near the head of the bed. The evidence against the defendant was entirely circumstantial, and the prosecution

seems to have proceeded on the theory that the deceased was mistaken for one John Allen, though the fact is not stated. The prosecution was allowed to prove, against the objection of the defendant, that the deceased and said Allen resembled each other, in size, complexion, color of hair, and general appearance; that the defendant had made threats against Allen both before and after the homicide, declaring his intention to wait about the stable for Allen, and to kill him, and exceptions were duly reserved by the defendant to the admission of each part of this evidence: The prosecution proved, also, the declarations of the defendant to his wife's sisters, the day after the killing, "that he had done a hanging crime;" and to the admission of this evidence the defendant excepted.

Joe Hanks, a witness for the prosecution, testified that on the night of the homicide he was passing in the street near the stable, heard a pistol shot fired, and saw the defendant walking away from the stable; that he hailed the person, calling the defendant by name, but received no reply. The defendant offered to prove by one Dick Harris, that he was present at a conversation between said Allen and one Nash, his brother-in-law, after the killing, in which Allen said: "We must pay Joe Hanks more money, and if we can get him to swear in the circuit court the same facts he swore to on the petition for bail, we will convict Clarke, and get rid of him." The court excluded this evidence, on objection by the prosecution, and the defendant excepted.

Dave Brown, the officer by whom the defendant was arrested, was examined as a witness for the prosecution, and testified that "when he went to the house he found the defendant's wife standing in the door, and asked her about some tramps, and then where her husband was; that he spoke in his usual conversational tone; that she replied, 'he is out on the river;' that he then stepped in the door, and saw defendant in the far end of the adjoining room, close up in the corner, just opposite where his wife was. Defendant asked said witness, on cross-examination: 'Did defendant hear the answer made to you by his wife?' Witness answered: 'I don't know.' Defendant's counsel then asked: 'Was defendant in the adjoining room, where you found him when his wife said that he was on the river?' Witness answered: 'I can't say he was.'

The defendant then moved the court to exclude from the jury the said answer made by his wife to said witness," and he excepted to the overruling of his motion.

The defendant testified as a witness for himself, and was asked on cross-examination: "Did you not belong to the Jesse James gang?" The defendant's counsel objected to this question; the court overruled the objection, and the defendant excepted.

Neither the dockets nor the transcript shows the name of the counsel who appeared in this court for the appellant; but there is a brief on file, without signature, which cites *Golden v. The State*, 55 Ala., 178, and Clark's Man. Crim. Law, 442, and says that all the points raised by the bill of exceptions are insisted on.

Thos. N. McClellan, attorney-general, for the state, cited *Jackson v. The State*, 52 Ala., 305; *Diggs v. The State*, 49 Ala., 311; *Edward v. The State*, 49 Ala., 336; *Henderson v. The State*, 70 Ala., 29; *West v. The State*, 76 Ala., 98.

CLOPTON, J. 1. The record discloses an order that a copy of the indictment and list of jurors summoned be served on the defendant, but it is silent as to the service. In such case, on appeal, the service will be presumed to have been regular, in the absence of objection. *Spicer v. The State*, 69 Ala., 159.

2. There was evidence showing that the offense was committed in Jefferson county. No instruction was given or requested in respect to its sufficiency. Without a decision by the circuit court, made the subject of an exception, and involving an inquiry into the sufficiency of the evidence, this court cannot interfere. *Hubbard v. The State*, 72 Ala., 164.

3. A consideration of the theory of the case, as contended and attempted to be proved by the prosecution, is necessary to a proper determination of the relevancy and competency of much of the evidence to which objection is made. There is an absence of proof showing any malice or ill-feeling on the part of defendant towards the deceased. It does not appear there had been any previous acquaintance between them. The theory of the state is that the accused shot the deceased, mistaking him for Allen, whom he intended to kill. If this theory

be found true by the jury, the defendant is guilty or innocent of the offense charged, the same as if the fatal shot had killed the person for whom it was designed. *Tidwell v. The State*, 70 Ala., 33.

4. Previous threats of the defendant against the person slain are admissible, as evincing malice, a criminal intent and a motive to commit the deed. While not by themselves convincing, they are properly submitted to the jury in connection with the other circumstances of the case, on the question of guilt or innocence. *Redd v. The State*, 68 Ala., 492; *Winslow v. The State*, 76 Ala., 42. The record discloses evidence, which, if believed, proves that the accused at the time of the shooting, mistook the deceased for Allen. While the general rule is that a threat to kill some person, other than the deceased, does not prove or tend to prove the offense charged, yet, in a case of mistaken identity, evidence evincing malice, criminal intent, and a motive to kill the person really intended, is admissible on the same principles and for the same reasons as if such person had been killed under the same circumstances. The credibility and sufficiency of the evidence to establish mistaken identity, as to which we intimate no opinion, is a question exclusively for the jury, who should receive instructions to give no weight or consideration to the threats, unless satisfied that the defendant shot under the belief that the deceased was Allen.

5. The circuit court did not err in admitting proof of threats and a difficulty subsequent to the killing. Such evidence tends to show a continuance of the previous hostile feelings, and a continuous intention to consummate his design as to Allen. They are circumstances which may be properly considered by the jury in connection with the preceding threats and circumstances, in determining the intent and motive with which he shot the deceased. *McManus v. The State*, 36 Ala., 285. It may be, that had proper objections been made, the details of the difficulty should have been excluded, but the objection was only directed to the fact of a difficulty, and there was no motion to exclude any part of the answer of the witness.

6. Any conduct of the accused, such as flight, concealment, endeavor to avoid arrest, or other indications of a consciousness of guilt, though weak and inconclusive, are admissible

against him. The conversation between the wife of the defendant and the officer who went to arrest him, if heard by him, and his failure to discover himself, falls within this class of evidence. On account of the uncertainty of such evidence, it should *prima facie* appear to the court that the accused heard and understood the purport of the conversation, and knew that the person inquiring for him was an officer; and the jury should be instructed to disregard it, unless satisfied of the preliminary requisites to its admission.

7. The credibility of a witness cannot be impeached by the mere declarations of persons not parties to the case, the witness not being present. The conversation between Allen and Nash, relating to the payment of money to Hanks, was properly excluded. If he was paid to testify as he did, his evidence is unworthy of credence; but the subornation must be proved otherwise than by hearsay evidence.

8. The court erred in allowing proof of the cause of the difficulty between the defendant and Allen. "The cause, merits or details of the quarrel can never be material or pertinent — always tend to foist into the connection an immaterial issue and should not be received." *Munden v. Bailey*, 70 Ala., 63; *Garrett v. The State*, 76 Ala., 18.

9. By statute, "on the trial of all indictments, complaints, or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him, nor be the subject of comment by counsel." Acts 1884-5, p. 139. In *Brandon v. The People*, 42 N. Y., 265, the defendant was on trial for grand larceny. She was sworn as a witness on her own behalf, under a statute similar to ours, and on cross-examination was asked if she had not been arrested before for theft. The question was objected to, as an attack upon her character, which she had not herself put in issue. The court held the question was a proper one, and, no suggestion of privilege having been made, the objection was properly overruled. It is said: "She elected, however, to make herself a witness. She became and was a competent witness. For this purpose she left her position as a defendant. and, while upon the stand, was subject to the same rules, and called to submit to the same tests, which could by law be ap-

plied to other witnesses." It seems that the rule, as thus stated, has been followed in subsequent cases; and in other states, under similar statutes, it has been declared, in general and unqualified terms, that a defendant, voluntarily becoming a witness, occupies, for the time being, such position, and subjects himself to the same tests, which by law could be applied to other witnesses. *State v. Ober*, 13 Amer. Rep., 88; *Fletcher v. The State*, 19 Amer. Rep., 673; *State v. Wentworth*, 20 Amer. Rep., 687. Judge Cooley has expressed wholly adverse views. Speaking of the statutes which allow the accused to give evidence, he observes: "These statutes, however, cannot be so construed as to authorize compulsory process against an accused, to compel him to disclose more than he chooses; they do not so far change the old system as to establish an inquisitorial process for obtaining evidence; they confer a privilege which the defendant may use at his option. If he does not choose to avail himself of it, unfavorable inferences are not to be drawn to his prejudice from that circumstance; and if he does testify, he is at liberty to stop at any point he chooses, and it must be left to the jury to give a statement, which he declines to make a full one, such weight, as, under the circumstances, they think it entitled to." Cooley's Const. Lim., 385. It may be that the learned author's mind was specially directed to the statute of Michigan, which allowed the accused to make an unsworn statement, but subject to be cross-examined on such statement. If the observations apply to statutes which permit a defendant to become a witness, sworn and examined as such, we cannot concur in a construction which authorizes the accused, after exercising his option, and while occupying the position of a witness, to disclose and to decline to disclose such facts as may, in his opinion, suit his convenience and interest, leaving his refusal to make full answers merely to be considered by the jury in weighing his evidence. Neither do we assent to the principle asserted in *Brandon v. People*, *supra*, to the effect that the accused, in becoming a witness, abandoned his position as a defendant for the time being, and is not to be regarded other than as a witness. The proper construction of the statute is that which best harmonizes the obligations and duties of the accused as a witness with his rights

as a defendant — which considers him as occupying, while testifying, the dual relation of witness and defendant.

The purpose of the statute is the protection of the innocent against punishment — founded on the same humane policy which requires satisfaction of guilt beyond a reasonable doubt as requisite to conviction, and was not intended as a trap to catch the unwary. The design was to afford the accused an opportunity to put the entire case before the jury, who are to determine the weight and sufficiency of his evidence, on the basis of consistency and corroboration. When the defendant voluntarily becomes a witness, he assumes the duty and obligation to tell the truth, and the whole truth; and the tests to which he subjects himself are, cross-examination relating to any matter connected with the transaction, or pertinent to the issue, and impeachment by assailing his general character, or by proof of contradictory statements on other occasions. As to any fact or circumstance relevant to the issue, or which sheds light upon the commission and character of the offense, though inculpatory, he waives his constitutional right to protection against being compelled to give evidence against himself. But the waiver extends no farther than to all such facts and circumstances as may tend to illustrate the particular offense charged.

We do not under-estimate the necessity, importance and efficacy of a thorough, searching and proper cross-examination to elicit truth and expose falsehood, in the case of an unwilling, prejudiced or perjured witness. This court, by past decisions, has been liberal in the latitude allowed to cross-examination, wherein much must necessarily be left to the discretion of the trial court, who sees the conduct, demeanor and disposition of the witness, which cannot be portrayed by word-painting. If it were conceded that, when a person is undergoing examination, who occupies only the relation of a witness, inquiries may be made into past transactions, accusations of crime, and arrests and imprisonment for alleged offenses, as affecting his credibility — to what extent such inquiries may go we do not decide; the question presents a different phase, when such inquiries are made of a defendant, though availing himself of the privilege of the statute, and at his own request

becoming a witness. When there is only the relation of a witness, the defendant may not be affected, other than as the credibility of one of his witnesses may be impaired; but, when the accused is himself the witness, not only may his credibility as a witness be affected, but his conviction may be obtained on his real or supposed commission of other and distinct offenses, when the evidence otherwise is in itself insufficient. To avoid such injustice, and to secure to the defendant a fair and impartial trial in the sense guaranteed by the law, the waiver of the constitutional immunity from compulsory self-examination should not be extended beyond facts which may be testified to by other witnesses, or which may be relevant to the issue, or may tend to elucidate it. Within these limits, the fullest cross-examination should be allowed; but its range into inquiries respecting past transactions, and offenses separate and distinct, is prohibited by the constitutional inhibition.

In *People v. Brown*, 72 N. Y., 571, Church, C. J., says: "I am of opinion that the cross-examination of persons who are witnesses in their own behalf, when on trial for criminal offenses, should, in general, be limited to matters pertinent to the issue, or such as may be proved by other witnesses. I believe such a rule necessary to prevent a conviction for one offense by proof that the accused may have been guilty of others. Such a result can only be avoided, practically, by the observance of this rule." The case was distinguished from *Brandon v. People*, *supra*, in that the privilege was claimed, and was not in the Brandon case. It was further held, the rule that the privilege must be claimed by the witness, and that the objection cannot be made by a party, does not apply; that the defendant, by taking the stand as a witness, is not deprived of his rights as a party, and his counsel may speak for him. In our opinion, a general objection, taken by counsel, through whom a defendant has a right to be heard, no specified ground of objection being stated, and without claiming the privilege in terms, is sufficient. A mere objection excludes an implied waiver of the constitutional protection. The statute was not designed to expose the past life of a defendant, his real or suspected crimes and immoralities, to inquisitorial inquiries. Otherwise, in the words of Judge Cooley, "the statute must have set aside and overruled the constitutional maxim, which

protects an accused party against being compelled to testify against himself, and the statutory privilege becomes a snare and a danger." And as Campbell, J., says, in *People v. Thomas*, 9 Mich., 314, "But, perhaps, the worst evil would be the degradation of our criminal jurisprudence, by converting it into an inquisitory system, from which we have been thus far happily delivered."

The question propounded on cross-examination to the defendant, while being examined as a witness, is, "Did you not belong to the Jesse James gang?" It may be said to be matter of history, that such gang was composed of desperadoes and outlaws, with a career atrocious with robberies and murders. Suspicion of association therewith is condemnation in public estimation, degrades, criminales and excludes public sympathy. The question related to a matter not pertinent to the issue, nor involved, directly or indirectly, in the offense for which the defendant was on trial, was only calculated to unduly prejudice him in the mind of the jury, and on objection should have been excluded.

We discover no error in the other rulings of the court.

Reversed and remanded.

NOTE.— Upon the trial of an indictment for assault and battery with intent to murder, it having been proved that the prosecuting witness first attacked the defendant, evidence of previous threats made by such witness is admissible to illustrate the character of the attack, although they were never communicated to the accused. *Leverich v. The State*, 105 Ind., 277. As to threats generally, see *Winslow v. The State*, 5 Am. Cr. R., 43, and *Wiggins v. People*, etc., 4 id., 494.

PEOPLE V. KIERNAN.

(101 N. Y., 618.)

MURDER: *Practice — Jury — Challenge to the array — Evidence — Premeditation — Intent*

1. JURY — CHALLENGE TO THE ARRAY.— A challenge to the array, on the ground that the names of additional jurors were not properly drawn, will not be sustained if the jurors were drawn "in open court," and "from the box directed by the court," even though no directions were given by the court, except by the formal order entered, where that

specified the box as the one "containing the names of the trial jurors for said court." The fact that the other two boxes were not in court is a mere formal irregularity.

2. PREMEDITATION — EVIDENCE. — Where the prisoner the night before fired one barrel of his revolver in his saloon, leaving three barrels loaded, and just before committing the crime said: "You or me going to die," it is sufficient to justify the jury in finding that the murder was deliberate and premeditated: and whether the previous firing was intended to empty the revolver or to test it is a question of fact for the jury.¹

Benj. W. Downing, for appellant.

Jno. Fleming, for respondent.

FIXER, J. The prisoner's challenge to the array was made in writing; issue taken by the district attorney upon its alleged facts; that issue tried by the court; and the challenge overruled. It averred, as the error in drawing the panel of additional jurors ordered by the court, "that the names of such jurors were not drawn from the box or boxes by the court directed, publicly, in open court, in the presence of the court, as by law provided." The broadest possible construction of this language would result in an averment of but two facts; one, that the names of additional jurors were not drawn from the box directed by the court; and the other, that they were not drawn in open court. The mode of drawing is prescribed in detail by the Code of Civil Procedure (sec. 1035 *et seq.*). There are three boxes provided for the ballots, on which are the names of the jurors selected to serve for three years. Box No. 1, at the beginning of the three-years term, contains the names of all the jurors liable to be drawn; box No. 2, as terms are held, contains the names of jurors who have been drawn and served; and box No. 3 contains duplicate ballots of the trial jurors selected who reside in the city or town where a trial term is appointed to be held,—so that box No. 1 is the ordinary source of supply, and box No. 3 is provided for an emergency, when there is no time to call jurors from a distance. As the terms proceed the names of jurors who have served are placed in box No. 2, so that the contents of boxes 1 and 2 are continually changing. If during the three years the ballots in box No. 1 become exhausted, the drawing goes

¹ See note.

on from box No. 2 until the new lists are transmitted. Sec. 1051. When additional jurors are found necessary at a term of the court, an order is made "requiring the clerk of the county to draw and the sheriff to notify any number of jurors specified, in the order which the court deems necessary." Sec. 1058. In the present case that order was made and entered, containing all the prescribed requisites. By the next section (sec. 1059) the mode of obeying the order is fixed. "The clerk must thereupon forthwith bring into court all the boxes wherein ballots containing the names of trial jurors are deposited, as prescribed in this article; and must, in the presence of the court, publicly draw from such box or boxes as the court directs the number of trial jurors specified in the order." It is now said that all the boxes were not brought into court. No such omission was alleged in the prisoner's challenge. That specified no irregularity from the absence of requisite boxes, and no evidence upon the subject was needed or produced. There was no such issue, and no proof to maintain it. If the statements of the clerk that "only one box was brought into court," and that "there is only the one box to bring in and draw from," establish that the other two were not already in court, and were not brought in, the irregularity would be purely formal, and work no possible harm to the prisoner, if the court selected the box. The clerk testified that the one hundred and fifty additional jurors required by the order were drawn by him "in open court," and "from the box directed by the court." The irregularities alleged in the challenge were thus directly disproved, and justified the court in overruling it. It is contended, however, that the court did not direct from which box the names should be drawn. The clerk swears that such direction was given, and he obeyed it. If none was given, except by the formal order entered, that was sufficient. It identified the box to be brought in and drawn from as the one "containing the names of trial jurors for said court." This language must be construed to mean the box of ordinary supply, and containing the names of all the trial jurors liable primarily to serve at that term of the court, and that could only have been box No. 1. It could, perhaps, be said that the order might have referred to either of the others, and so was ambiguous. But, conceding so much, the court

must have understood its own order, and the drawing, having occurred in its presence, and with its assent, must have been from the box intended and directed. We do not think that any irregularity was established.

(The remainder of the opinion is taken up with a discussion of the facts, the court holding that the testimony justified the conviction.)

NOTE.—Conduct and feeling of prisoner towards his victim.—In cases of homicide it is always competent to show the conduct and feelings of the prisoner towards his victim, and proof that he had made previous threats and attempts to kill his victim have always been received in evidence. *People v. Jones*, 100 N. Y., 667.

Premeditation — Deliberation — Passionate impulse.—A man may deliberate, may premeditate, and intend to kill, after premeditation and deliberation, although prompted, and to a large extent controlled, by passion at the time. *Id.*

Former encounter — Cooling time.—Where there has been a previous quarrel between the accused and the deceased, and when the interval between the first and the final and fatal encounter was of sufficient duration to afford reasonable time for the passions to cool, malice is established, and the killing is murder. *The State v. Grayor*, 89 Mo., 600.

Deadly weapon — Deliberate use.—A deliberate use of a deadly weapon is an intentional use, a use that is the result of a resolution, purpose or design formed in the mind and reflected upon, and not done in self-defense. It is only necessary that it be the act of the mind when the mind has had time to act without heat or passion. *The State of Oregon v. Abrams*, 11 Or., 160.

Intent, etc.—Where an indictment read: "H. W. Abrams is accused by the grand jury," etc., "of the crime of murder committed as follows: The said H. W. Abrams, on the 19th day of January, A. D., 1883, in the county of Lane and state of Oregon, then and there being, purposely and of deliberate and premeditated malice, killed J. G. Brownlee by then and there unlawfully and feloniously shooting him, the said J. G. Brownlee, with a revolving pistol," etc., *held*, that the words "unlawfully and feloniously" qualify the shooting alone, and do not relate to the particular intent with which the killing was done. *Id.*

Same — Presumption.—When the intent is the gist of the crime, the presumption that every sane man contemplates, and intends the necessary, natural and probable consequences of his own acts, though a very important circumstance in making the proof necessary, upon this point, is not conclusive, nor alone sufficient, to convict, and should be supplemented by other testimony to avoid a reasonable doubt. *People v. Sweeney*, 55 Mich., 586.

STATE V. RHEAMS.

(34 Minn., 18.)

MURDER: Self-defense — Evidence — Instruction — Error — Province of jury.

1. **SELF-DEFENSE.**—Homicide is not justifiable as an act of self-defense from an assault threatening bodily harm, if it is apparent to the person assailed that the threatened injury may otherwise be avoided as by retreating.¹
2. **EVIDENCE — INSTRUCTION.**—Evidence upon the trial of an indictment for murder considered as showing that the killing, as an act of self-defense, was obviously unnecessary. Evidence deemed legally insufficient to show a justification. A charge to the jury to that effect held not error.
3. **PROVINCE OF JURY — WEIGHT OF EVIDENCE.**—It is the duty of the court to declare the law to the jury in criminal as well as in civil cases. Whether the evidence has a tendency to prove any fact in issue in a criminal cause is for the determination of the court; not so as to the weight of evidence.

Appeal by defendant from an order of the District Court for Clay County.

Mosness & Douglas, for appellant.

W. J. Hahn, attorney-general, and *J. M. Martin*, for the state.

DICKINSON, J. The defendant, having been indicted for murder in the first degree, was found guilty of manslaughter in the second degree. The alleged error to be considered upon this appeal arises upon the instructions of the court to the jury, in which the court charged, in effect, that the case was not one of justifiable homicide, and that there was no evidence showing a justification. By a bill of exceptions a portion of the evidence is before us, which is claimed to show that the homicide, which is not denied, was committed in self-defense, and was justifiable. We are therefore to consider whether the evidence tended to sustain this defense.

The facts most favorable to the defendant, as presented by this evidence, may be thus briefly stated: The defendant resided five miles from the village of Glyndon, where the homicide was committed. On this day he had come to Glyndon with his team, another man, Sandquist, accompanying him. A

¹ See note.

few minutes before the killing of deceased the defendant had had difficulty with one *George Chase*, a brother of the deceased, and had stabbed him with a knife, after which *George* had threatened to kill the defendant. The parties, however, then separated, and the defendant and *Sandquist* went to their team, being then ready to return home. The defendant testifies that he was afraid of being overtaken on the road and killed, and therefore, leaving his team, he went back through the street, where he again encountered *George Chase*, whom he passed, and going to a store procured a revolver, which he caused to be loaded. Putting this in his pocket, he went from the store into the street. At this time the deceased, *Frank Chase*, approached him, angrily saying, "You . . ., what did you stab my brother for?" After some warning from the defendant to let him alone, the deceased said, "Damn you, I can thrash you, and I will thrash you." *George Chase* was near by, and urged on the deceased. The defendant then drew the revolver and fired it into the air, further warning the deceased to keep away from him. The deceased sprang forward as though to seize the defendant. The defendant ran away, and as he ran, pursued by the deceased, he *immediately* commenced shooting at the latter, turning to aim and fire, and then continuing his flight. This was continued until the deceased fell, mortally wounded. The parties were then from five to ten feet apart. The defendant thus fired three or more times at the deceased. As they ran in this manner the deceased gained somewhat upon the defendant.

The defendant was a man thirty-two years of age, weighing only one hundred and twenty pounds, but, so far as appears, possessed of ordinary physical vigor. The deceased was a strong man, taller and larger framed than the defendant, weighing about two hundred pounds. He was not armed in any manner, so far as appeared. In reviewing the action of the court declaring to the jury that the evidence did not show a justification, we must assume that the defendant was, in fact, acting upon the defensive, and that he did not himself provoke the attack of *Chase*, or seek an occasion for killing him. We will also assume, although we are not clearly satisfied that the evidence sustains the assumption, that the defendant believed that he was threatened with great bodily harm from his assail-

ant, and not a simple battery; and that the circumstances were such as to justify a man of ordinary fortitude in so believing. But more than this is necessary to sustain the defense of justification. In *State v. Sorenson*, 32 Minn., 118, it was declared that the right to kill an assailant in self-defense can only be resorted to in extremity, and when no other practicable means to avoid the threatened harm are apparent to the person assailed; and the duty was recognized, in a case such as we have assumed this to be, to escape by retreat, unless that is prevented by some impediment, or by the fierceness of the assault, rather than to take the life of the aggressor.

In view of this duty on the part of the defendant, the evidence falls short of showing a justification. The assault was in the day-time, in the village street. The deceased was unarmed, while the defendant had a loaded revolver. When the defendant commenced firing at the deceased the parties were so far apart that the opportunity for retreat was perfectly apparent, and it was equally apparent that if the defendant should avail himself of that opportunity the danger of personal injury was not immediate. He was not surprised by an assault so suddenly made that he had no time to consider as to the means of escape. He was expecting such an assault, and had prepared himself to meet it. He knew that the way of retreat through the public street was open. His weapon was in his hand, and had been once discharged before the deceased attempted to touch him. Possessed of the advantage of being thus armed, notwithstanding the greater physical power of the deceased, and with the obvious opportunity for avoiding the threatened injury, the law forbade that he should attempt the life of his assailant, for the necessity was not then apparent. It is true that he ran away from Chase as the latter came after him, but the circumstances attending the flight deprive it of the character of a real attempt by that means to avoid the necessity for taking the life of the aggressor. So far as the question under consideration is concerned, he might as well have stood in his tracks without retreating, and have killed Chase as he approached him. His *duty* was to flee, and thus avoid the necessity for killing his adversary. His *act* was to flee, and *at the same time*, and before the necessity became apparent, to kill his adversary. He commenced shooting im-

mediately upon the commencement of the assault, and continued shooting, unnecessarily retarding his own flight by turning to aim and fire, until his pursuer fell. It seems at least probable that if the defendant had not thus retarded his flight he would have completely escaped from Chase, for his own testimony is: "I can hardly tell whether one or the other gained, but I think we kept pretty even, or once in a while he gained."

Taking the evidence relied upon by the defendant to be true, we think that it was legally insufficient to show a justification. This being so, it was the province of the court to so instruct the jury. Such an instruction was a declaration of the law, and not an invasion of the province of the jury, to determine the facts. In *State v. Taunt*, 16 Minn., 99 (Gil., 109), it was said (page 104): "Where there is testimony which has any legal effect, it would be error in the court to determine the weight of it, or the fact which it did or did not ascertain. But whether evidence tends to prove anything pertinent to the issue is a question for the court." See, also, 1 Greenl. Ev. (14th ed.), § 49; *Chandler v. Von Roeder*, 24 How., 224; *Garnett v. Kirkman*, 33 Miss., 389. It is the duty of the court to declare the law in criminal cases as well as in civil, and the jury has no right in either class of cases to present a verdict without regard to the law so declared, and by which their judgment should be controlled. Gen. St. 1878, ch. 114, § 11; *Com. v. Anthes*, 5 Gray, 185; *Com. v. Rock*, 10 Gray, 4; *Pierce v. State*, 13 N. H., 536; *Lord v. State*, 16 N. H., 325; *Duffy v. People*, 26 N. Y., 588; *U. S. v. Battiste*, 2 Sum., 240; 1 Greenl. Ev., § 49, notes, and cases cited.

The order refusing a new trial is affirmed, and the cause remanded to the district court.

BERRY, J. Upon all the relevant testimony reported in the bill of exceptions in this case (and it seems to me that there is some of importance which is not stated or recited in the majority opinion), I think the question of justifiable homicide should have been submitted to the jury, and that the refusal to so submit was error.

NOTE.—See *Panton v. The People*, 5 Am. Cr. R., 425, and note, where the doctrine of self-defense is fully discussed.

PEOPLE v. LENNOX.

(67 Cal., 113.)

MURDER: *Withdrawal of plea of guilty after judgment — Error — Waiver of trial by jury.*

1. **PLEA OF GUILTY — WITHDRAWAL AFTER JUDGMENT.**—Where a defendant accused of murder withdraws his plea of not guilty voluntarily, and pleads guilty, and thereupon the degree of the crime is fixed by the court as murder in the first degree, and he is sentenced to be hung, it is too late for him then, though before the judgment is entered by the clerk in the record, to withdraw his plea of guilty, and to plead not guilty, on the ground that he was misled in withdrawing his plea of not guilty and pleading guilty, in that he had done so on the belief expressed by his attorney and others, that if he pleaded not guilty, and was tried by a jury, the jury would find him guilty, and affix the death penalty, while, if he pleaded guilty, the court might, in the exercise of its judgment, fix the punishment at imprisonment for life. The refusal of the court to allow such course is not error.
2. **WAIVER OF TRIAL BY JURY BY PLEA OF GUILTY.**—By a plea of guilty on a trial for murder the defendant waives his right of trial by jury.

Appeal from the Superior Court of the County of Los Angeles.

John F. Godfrey, for appellant.

Attorney-General Marshall, for respondent.

MYRICK, J. The defendant was accused by information of the crime of murder. He was arraigned and pleaded not guilty, and the cause was set for trial. On the day set, September 4, 1884, the defendant by his counsel moved the court for leave to withdraw his plea of not guilty, and offered to plead *nolo contendere*. The motion was objected to by the district attorney, and was denied by the court. The defendant then asked leave to withdraw his plea of not guilty, which motion was granted. The defendant then pleaded guilty. Thereupon the court proceeded to hear evidence for the purpose of fixing the degree of the crime. Witnesses were examined, as well those offered by the defendant as for the prosecution,—some thirty in all. After hearing the evidence the court fixed the degree of the crime to be murder in the first degree, and set September 11, 1884, as the day on which the

punishment should be determined. On that day, the court, referring to section 190, Penal Code, and to the testimony which had been taken, declared to the defendant that the discretion to be exercised by the court, as to whether the punishment should be death or imprisonment for life, was the same as that to be exercised by a jury determining the same question, and that "from the evidence in this case I can find no circumstances of mitigation, but many of aggravation; the fact that your passions were inflamed with strong drink can furnish no extenuation. I must therefore adjudge that you be taken hence by the sheriff of this county to its county jail, where you will be by him retained until, at a time and place to be hereafter determined by the court, you will be hanged by the neck until you are dead." Thereupon, and before the clerk had entered the judgment in the record, the defendant's attorney moved the court to permit the defendant to withdraw the plea of guilty, and to plead not guilty, on the ground that the defendant had been misled in withdrawing his plea of not guilty and pleading guilty. The reasons given in the record why the defendant deemed himself misled in pleading guilty were because his father, a deputy-sheriff, and his attorney expressed to him the belief that if he pleaded not guilty and was tried by a jury, the jury would find him guilty and affix the death penalty; whereas, if he pleaded guilty, they believed the court might, in the exercise of its judgment, fix the punishment at imprisonment for life.

We see no error. The defendant, with his own knowledge of what he had done, with the concurrence of his attorney and such others as he sought advice of, pleaded guilty to the charge. The court, in compliance with section 1192 of the Penal Code, determined the degree, and, after hearing evidence, determined, in compliance with section 190 of the Penal Code, the punishment. All the proceedings seem to have been according to law. Not until after the court had performed its duty of fixing the punishment did the defendant express any desire to reconsider his plea of guilty. The point that the defendant could not, by pleading guilty, waive a trial by jury, is answered adversely to him by the decision in *People v. Noll*, 20 Cal., 164.

The judgment and the orders appealed from are affirmed,

Error — Waiver

Where a defendant voluntarily, and is fixed by the court to be hung, and is entered by the court and to plead not guilty, his plea of not guilty, the belief expressed by the court that the defendant was guilty, and was affixed the death penalty, the exercise of the court's power for life. The re-

a plea of guilty of trial by jury.

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formation of the defendant pleaded not guilty, and the day set, September 1st, 1901, the court offered to the defendant to be tried by the jury, which the defendant refused, and the court entered judgment of guilty, which the defendant appealed from, for the purpose of having the case examined by the court, as for the purpose of having the evidence examined by the court in the first instance, in which the

and the cause is remanded to the superior court of Los Angeles county, with directions to proceed according to law in carrying the sentence into execution.

SHARPSTEIN, J., and THORNTON, J., concurred.

CITY OF FARIBAULT V. WILSON.

(34 Minn., 254.)

ORDINANCE: *Entitling a case—Complaint—Police power of the state—Municipal corporations—Dogs running at large—Publication of ordinances.*

1. JUSTICE ENTITLING CASE IN NAME OF CITY.—That a justice of a city, in the entries on his record, and in the papers subsequent to the warrant, entitles a criminal proceeding in the name of the city instead of in the name of the state, they fully disclosing the character of the proceeding, is a mere irregularity which will be disregarded.
2. COMPLAINT FOR VIOLATING CITY ORDINANCE.—A complaint for violation of a city ordinance need not set forth the ordinance, but may refer to the number and section and subject of the ordinance, and state the acts alleged to have been in violation of it.
3. POLICE POWER OF STATE—REGULATING KEEPING OF DOGS.—To regulate the keeping of dogs, and enforce the regulations by forfeitures, fines and penalties, is within the police power of the state.
4. REASONABLE REGULATIONS.—An ordinance of a city for that purpose construed, and *held* not to be unreasonable.
5. DOGS RUNNING AT LARGE—PUNISHMENT.—The charter of the city empowered the council to punish the violation of any ordinance by fine and imprisonment. The specification of the powers of the council in respect to various subject-matters includes the power "to regulate or prevent the running at large of dogs, to require license for keeping the same, and impose a fee for such license, and a tax upon dogs, and authorize the destruction of the same in a summary manner when not licensed, or when at large contrary to the ordinance." *Held*, that giving the power to authorize the destruction of dogs does not take away the power to punish violations of the ordinance by fine or imprisonment.
6. PUBLICATION OF ORDINANCES.—The charter provided for publication of ordinances, and that "the publication thereof shall be proved by the affidavit of the foreman or publisher of such newspaper, which at all times and in all courts shall be deemed and taken as sufficient evidence of such publication." *Held*, that the statement in the affidavit that the person making it was the foreman or publisher of the newspaper is sufficient evidence of that fact.

Appeal by defendant from a judgment of the District Court for Rice County.

Baxter, Townley & Gale, for appellant.

A. D. Keyes, for respondent.

GILFILLAN, C. J. The charter of the city of Faribault (Sp. Laws 1872, ch. 11, subch. 3, sec. 3, subd. 9, p. 108, as amended by Sp. Laws 1878, ch. 27, sec. 3, p. 243) authorizes the council "to regulate or prevent the running at large of dogs, to require license for keeping the same, and impose a fee for such license, and a tax upon dogs, and authorizes the destruction of the same in a summary manner when not licensed, or when at large contrary to the ordinance." The council passed an ordinance containing these provisions: "Section 1. That any dog, bitch, or slut, or any animal of the dog kind, owned by or being in the possession of any resident or any person in the city of Faribault, shall be registered by such person or resident with the city recorder, on the 1st day of July of each year, and shall at the same time pay to the city recorder, for the use of the city, a license of \$1 on each dog and \$3 on each bitch or slut so owned or possessed by such resident or person. Every owner or possessor of any dog, bitch or slut, or any animal of the dog kind, shall procure from the city recorder a certificate, which shall state therein the number and date of such license, the name of such owner or possessor, and the name of such dog, bitch or slut so licensed;" and also providing for a fine not exceeding \$10 and costs upon any one violating those provisions, and imprisonment not exceeding thirty days until such fine and costs shall be paid.

Defendant was prosecuted and convicted before a city justice for violating this ordinance, and appealed to the district court, and, being convicted in that court, also appeals to this court. Various questions are raised on the appeal, which we will consider in the order in which they are presented.

1. That the prosecution should have been in the name of the state. The complaint to the justice was in proper form; the warrant ran in the name of the state, but in the record of the proceeding, and in the various papers issued in it subsequent to the warrant, the action is entitled in the name of the

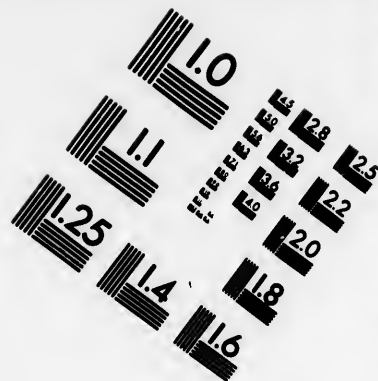
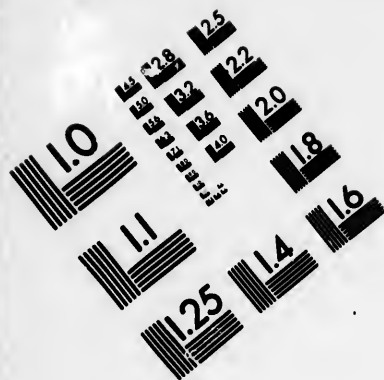
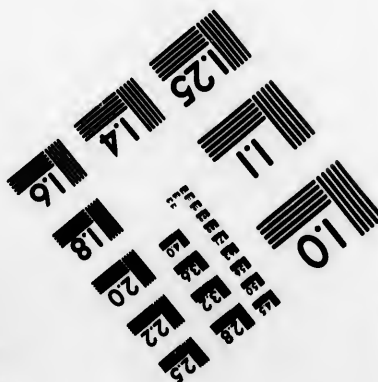
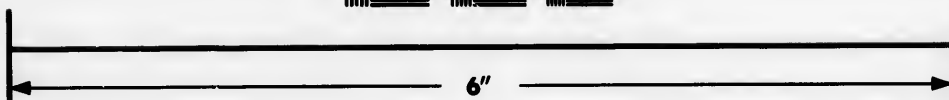
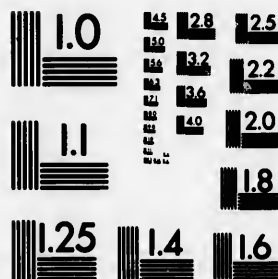


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city. Even if it were a criminal prosecution within the meaning of General Statutes 1878 (ch. 65, sec. 142), this would be a mere irregularity, not affecting the jurisdiction, nor, as the record fully discloses the character of the proceeding, so as to protect defendant against another prosecution for the same offense, affecting any substantial right, and should be disregarded. *State v. Graffmuller*, 26 Minn., 6.

2. That the complaint should have set forth the ordinance. As the ordinance had, within the city of Faribault, the force and effect of law, of which all persons were bound to take notice, it was sufficient, under Laws 1881 (Ex. Sess.), chapter 59, to refer it, as the complaint does, by stating the number of the ordinance, and the number and subject of the section alleged to have been violated; and it was enough to allege that the offense was in violation of the section, instead of using the words in chapter 59, "contrary to the form," as the allegations are in legal effect precisely equivalent.

3. That it was not competent for the legislature to authorize the council to pass any ordinance making the acts or omissions charged an offense. The power to regulate the keeping of dogs, and to enforce such regulations by forfeitures, fines and penalties, is one that has been very generally exercised. It is recognized as within the police power. *Cooley on Taxation*, 412; *Blair v. Forehand*, 100 Mass., 136; *Morey v. Brown*, 42 N. H., 373; *Mitchell v. Williams*, 27 Ind., 62; *Carter v. Dow*, 16 Wis., 298; *Tenney v. Lenz*, id., 566; *Ex parte Cooper*, 3 Tex. App., 489. Certainly, if the legislature may, within the police power, regulate the keeping or use of any kind of property,—and that it may is unquestioned,—it may prescribe regulations for the keeping and use of dogs, because from their nature they are liable to become nuisances.

4. That the ordinance is unreasonable. The grammatical construction of the ordinance may be open to criticism, but its meaning is clear enough. The main idea of it is that every dog kept within the city shall be registered, a license fee paid, and a certificate thereof issued to the person registering and paying the fee. And it may make it the duty of each—the owner and the keeper, where it is kept by one other than the owner—to see that it is registered, the fee paid, and the certificate taken out. Either of them attending to this, the duty

is discharged as to each. When he has registered and paid the fee, and applied for the certificate, he has done all that the ordinance, reasonably construed, requires of him. It is then the duty of the recorder to issue the certificate, in which the latter has no discretion, and for failure in which the party is not, and was not intended to be, responsible. Thus construed we see nothing unreasonable in the ordinance.

5. That by the charter the only remedy for violation of such an ordinance is by destruction of the dog. The chapter (sec. 3, ch. 3) empowers the council "to declare and impose penalties and punishments, and to enforce the same against any person or persons who may violate any provisions of any ordinance," etc.; and subd. 32 (same section), that the fines, penalties and punishments imposed by the council for breach of any ordinance, by-law or regulation may extend to a fine not exceeding \$100, and imprisonment, etc. The power to destroy the dog must be deemed added to the power to fine, etc., and not to take it away.

6. That publication of the ordinance was not properly proved. The charter (sec. 4, ch. 3, as amended by Special Laws, 1878, ch. 27, sec. 4), after providing for publication of ordinances, continues: "The publication thereof shall be proved by the affidavit of the foreman or publishers of such newspaper, which at all times and in all courts shall be deemed and taken as sufficient evidence of such publication." The objection taken is that the affidavit is not proof unless it be shown, otherwise than by a statement in it, that the person making it was the printer or publisher. We think it was intended that the affidavit alone should be sufficient evidence, and that it should show all that is necessary to make it evidence, including the fact that the person making it was the printer or publisher, and that it is the only evidence required of all that it contains which it was intended should be inserted in it.

Judgment affirmed.

IN RE SNELL.

(58 Vt., 207.)

ORDINANCE: *Municipal corporations — Power to restrain — “Restrain” and “suppress” not synonymous.*

1. **ORDINANCES — GENERAL LAWS — VILLAGE CHARTERS.**— Where a general law gives the selectmen of a town the power to permit or prohibit the use of billiard tables in a town, and a village charter, enacted subsequently, gave the village within such town the power to pass by-laws to suppress and restrain all description of gaming, *held*, that the word “restrain,” when used as in this charter, conferred the power to license, and was not synonymous with “suppress;” and that the provisions in the charter derogate from, and are inconsistent with, the general law, and the legislature must have intended by the charter to have repealed the general law as to the territory embraced in the village limits.¹
2. **LEGISLATIVE POWER — SPECIAL PROSECUTOR — STATE’S ATTORNEYS.**—The legislature has the power to provide for the commencement of criminal prosecutions by other officers than state’s attorneys, and to require their election by the people, as in the case of town grand jurors, or appointment by the governor, as in the act in question.

Petition for habeas corpus.

The petition set forth that the relator was imprisoned in Addison county jail; that he was detained by virtue of a *mittimus* issued by H. D. Maynard, a justice of the peace within and for said county; that the only foundation for said *mittimus* was a complaint against said petitioner preferred by one A. P. Tupper, special prosecutor within and for the town of Middlebury, upon the 6th day of October, 1885, to said Maynard as justice of the peace; that the complaint was in substance as follows: “That William H. Snell, of Middlebury, in the county of Addison, being the owner or keeper of certain billiard tables situate and being in the billiard saloon formerly occupied by A. B. Colby, in J. H. Dyer’s block, in the village of Middlebury, was, by W. H. Allen, J. W. Hulliday and A. H. Mathews, the selectmen of the town of Middlebury, on the 16th day of June, 1885, at said Middlebury, forbidden to use said billiard tables in said town of Middlebury for any play or game. . . . And said public prosecutor . . . complains and informs said justice that the said William H. Snell aforesaid, at Middlebury aforesaid,

¹ See note.

upon each of the following days and dates, to wit, thirty-two different days between July 14, 1885, and August 20, 1885, after having been by the said selectmen prohibited to use said billiard tables, . . . to wit, on each of the days and times aforesaid, did permit said billiard tables to be used, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state.

Stewart & Wilds and Eldredge & Slade, for relator.
Edward Dana, for defendant.

Taft, J. 1. The law of this state authorizes the selectmen of any town to permit the use of billiard tables, under regulations prescribed by them (R. L., sec. 4070); or they may forbid the use of them. Sec. 4068. This law being in force, the village of Middlebury was chartered and given the power to pass by-laws to *suppress and restrain* all descriptions of gaming, which clearly includes the game of billiards. The word "restrain," when used as it is in the village charter, has been held to confer the power to *license*. *Smith v. Madison*, 7 Ind., 86; *Emporia v. Volmer*, 12 Kan., 622; *State v. Clarke*, 54 Mo., 17. It is not synonymous with "suppress," but contemplates the continued existence of the business, placing it within bounds; in effect, licensing it. The powers conferred upon the selectmen and the village corporation are substantially the same; and if the claim of the prosecutor is the correct one, then each has the power to license or suppress gaming in the village limits. It can hardly be supposed that the legislature intended such a result. The provision in the charter derogates from and is inconsistent with the general law; and the legislature must have intended by it to repeal the latter, as to the territory embraced in the village limits. The case of *Daw v. Metropolitan Board of Works*, 104 E. C. L., 162, is similar to the one at bar. The question was, which of two public boards had power to number the houses in certain streets. The court say: "Where two statutes give authority to two public bodies to exercise powers which cannot consistently with the object of the legislature co-exist, the earlier must necessarily be repealed by the later statute. The purpose of numbering houses is to distinguish them from each other; and if the two boards had

each the power to alter the numbers, that purpose would be frustrated."

In this case, if the general law was not repealed by the charter, the selectmen could suppress and the village license, or the village suppress and the selectmen license, by contemporaneous action. Such a state of affairs could never have been contemplated by the legislature. The acts are repugnant, and the former is superseded by the latter. In *Bennington v. Smith*, 29 Vt., 254, the selectmen of the petitioning town laid out a highway in the village of Bennington, whose charter invested the trustees of the village with the same power and authority over highways within the village limits that the selectmen by general law had over the town. It was held that the power of the selectmen over the subject was not taken away by the village charter; but it was put upon the ground that there was no provision for compelling the village by indictment to keep its highways in repair, or for maintaining an action against it for losses sustained by reason of defects therein, or for laying highways continuously, part of which lay within the limits of the village, and part without. Such cogent reasons for a like holding do not exist in the present case; and by the general rules for the construction of statutes, above referred to; we must hold that the authority of the selectmen over the billiard tables was taken away.

2. This prosecution was commenced by a special prosecutor, appointed under act No. 112, passed at the session of 1884; and the relator claims that the act is in conflict with that article of the constitution which requires that "state's attorneys shall be elected by the freemen of their respective counties." We think the legislature have power to provide for the commencement of prosecutions by other officers than state's attorneys, as they have done since the early days of the government, and require their election by the people, as in the case of town grand jurors, or appointment by the governor, as under the act in question. Vacancies in most, if not all, elective offices are now filled by appointment; in some cases by the governor, in other cases by the judges or selectmen. As to the propriety of the act in question we have nothing to do. We simply decide that the legislature have power to provide for the commencement of prosecutions by informing

officers not elected by the people. The question of the constitutionality of the fourth section of the act, giving power to the special prosecutor to control the trial and disposition in the higher courts of the cases begun by him, is not before us.

The selectmen having no authority in the matter, their action was unauthorized. The relator was illegally imprisoned, and it is ordered that he be discharged.

NOTE.—License to traffic in intoxicating liquors—Power of municipal corporation to grant.—The legislature has the power, under the state constitution, to invest the subordinate municipal governments with control of the traffic in intoxicating liquors. *In re Schneider*, 11 Oreg., 288.

License—"Tavern," "Bar-room," etc.—A tavern has been judicially defined to be "a house licensed to sell liquors in small quantities to be drunk on the spot;" and there is no essential difference between the original meaning of the word "tavern" and the word "bar-room" or "drinking shop," as used in the charter of Portland. *Id.*

Ordinance—"Quarter" construed.—The word "quarter," as used in the ordinance providing for licensing and regulating "bar-rooms," "drinking shops," etc., means a quarter of a year, and is not indefinite or uncertain. *Id.*

Bond.—Under an authority to "regulate and restrain bar-rooms and drinking shops" is conferred power to require, as a proper measure of regulation and restraint, a bond to be given by an applicant for a license to keep a "bar-room" or "drinking shop" within the city limits. *Id.*

Validity.—The ordinance of Portland to "regulate and restrain bar-rooms and drinking shops" considered, and held to be valid. *Id.*

THE STATE v. CUNNINGHAM.

(66 Iowa, 94.)

PERJURY: Tax return—Indictment.

1. **INDICTMENT—AUTHORITY OF OFFICER TO ADMINISTER OATH—TAX RETURN.**—In an indictment for perjury the jurisdiction and authority of the officer to administer the oath must be shown by proper averment. But this may be done either by an express averment that the officer had jurisdiction and authority, or by setting out such facts as make it judicially to appear that he had such authority and jurisdiction. Indictment held sufficient.¹
2. **PROPERTY, WHEN ASSESSABLE.**—An indictment charging a party with perjury in making a false return of his taxable personal property to

¹ See note.

an assessor of taxes that does not aver that the property which he is charged with having concealed from the assessor was assessable in the township of his residence, nor that it was assessable by the assessor of that township, is bad.

Appeal from Polk District Court.

The grand jury of Madison county presented an indictment against the defendant, in which he was accused of the crime of perjury. On defendant's petition the venue of the cause was changed to Polk county. After the change of venue was perfected, he filed a demurrer to the indictment, which was sustained. The state appeals.

Ruby & Wilken and *Thomas S. Wright*, for defendant.

Smith McPherson, attorney-general, and *A. W. Wilkinson*, district attorney, for the state.

REED, J. The indictment is as follows: "The grand jury of the county of Madison, in the state of Iowa, being legally impaneled, sworn and charged in the name and by the authority of the state of Iowa, accuse John Cunningham of the crime of perjury, committed as follows: The said John Cunningham, being then and there a resident of Crawford township, Madison county, Iowa, on the 24th day of March, A. D. 1881, in the county of Madison aforesaid, in a proceeding in regard to a matter in and respecting which an oath is by law required, to wit: In the matter of the assessment for taxation of the personal property of him, the said John Cunningham, was then and there legally and duly sworn by, and took his corporeal oath before, one Wm. H. Kirby, who was then and there the legally elected and qualified assessor of Crawford township, Madison county, Iowa, and who was then and there authorized and required by law to assess for taxation the personal property of the said John Cunningham for the year A. D. 1881, and who was then and there as such assessor legally authorized and empowered by law, and by virtue of his said office of assessor, to administer an oath in the matter and proceeding aforesaid to the said John Cunningham; and the said John Cunningham, being duly and legally sworn as aforesaid by the said Wm. H. Kirby, then and there assessor as aforesaid, to speak the truth touching the matter aforesaid, wilfully, corruptly, knowingly and feloniously did then and

there falsely swear, in substance and effect, as follows: That is to say that he, said John Cunningham, had then and there given in to said assessor, Wm. H. Kirby, for taxation, a full, true and correct inventory of all the taxable property owned by him and liable to taxation, and that he, said John Cunningham, owned no hogs, nor moneys or credits, on the 1st day of January, A. D. 1881; whereas, in truth and in fact, said statement, as to his taxable personal property, thus made and sworn to by said John Cunningham, was then and there false, and known by said John Cunningham to be false when he made it, in this, to wit: That said John Cunningham then and there knowingly and wilfully concealed from said assessor, and failed to list for taxation, the following described personal property, moneys and solvent credits owned by said John Cunningham on the 1st day of January, A. D. 1881, and liable to taxation, as follows: Three hundred head of hogs, over six months old; seventy-five head of neat cattle; \$250 due said John Cunningham from M. M. Gilleran; \$600 due from James Egan to said Cunningham; \$1,000 due from William Shay to said Cunningham; \$500 due from J. W. Crosby to said Cunningham; \$100 due from D. T. Miles to said Cunningham; \$500 due from Patrick Doud to said Cunningham; \$150 due from Joseph W. Forney to said Cunningham; \$500 due from Patrick Doud to said Cunningham, being a second debt; \$1,000 due from Patrick Gill to said Cunningham; \$408 due from Patrick Doud to said Cunningham; \$210 due from Annie Aherne and Annie Laughlin to said John Cunningham; \$1,500 due from Patrick Doud on two obligations to said Cunningham; \$520 due from J. and A. Hamahan to said Cunningham; \$600 due from W. J. Dooley to said Cunningham; \$700 due from Patrick Gill to said Cunningham; \$1,000 due from F. J. Crosby to said Cunningham; \$1,900 due from Patrick Curtis, Jr., to said Cunningham; \$900 due from Thomas Dee to said Cunningham; \$1,000 due from Thomas Connors to said Cunningham; \$5,000 due from Jonah Shreeves to said Cunningham; \$1,200 due from James Egan to said Cunningham; \$1,700 due from Thomas Curtis to said Cunningham; \$170 due from Joseph W. Forney to said Cunningham,—contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Iowa."

The grounds of demurrer principally urged in argument by counsel for defendant are: (1) That it is not averred in the indictment that the oath was administered by said Kirby in the township in which he was assessor; and (2) that it is not averred that the property which defendant is charged with having concealed from the assessor was assessable in the township of his residence, nor that it was assessable by the assessor of that township.

1. We think the first objection is without merit. It is averred that defendant was a resident of Crawford township, and that Kirby was the assessor of that township, and that the oath was administered in the matter of the assessment of defendant's property for taxation. It is also averred that the assessor was empowered by law to administer an oath in the matter of said assessment. In an indictment for perjury the jurisdiction and authority of the officer to administer the oath must be shown by proper averment. But this may be done either by an express averment that the officer had jurisdiction and authority, or by setting out such facts as make it judicially to appear that he had such authority and jurisdiction. 2 Bish. Crim. Proc., § 853. Upon the averment in this indictment, that the assessor was authorized and empowered by law to administer the oath to defendant, the facts essential to his jurisdiction and authority to administer it may be shown.

2. The second objection urged is fatal to the indictment. Defendant would not be guilty of perjury in taking the oath, which it is averred he did take, unless the property and credits named in the indictment were assessable for taxation in the township of his residence, or by the assessor of that township. For, unless Kirby had jurisdiction to assess that particular property, the affirmation by defendant that he did not own it was entirely immaterial. The assessor is a township officer, and he has jurisdiction to assess such property only as is assessable in the township within which he is elected. Section 806 of the code provides that "when a person is doing business in more than one county, the property and credits existing in any one of the counties shall be listed and taxed in that county, and the credits not existing in or pertaining especially to the business in any county shall be listed and taxed in that where the principal place of business may be." The property de-

scribed in the indictment under this provision may have been assessable in another county. And it is very clear that there is no presumption from the fact merely that defendant was a resident of Crawford township, in Madison county, that it was assessable by the assessor of that township. The materiality of the false testimony must be shown by the averments of the indictment. But this may be done either by an express averment, or by the statement of such facts as show its materiality. 2 Bish. Crim. Proc., § 854. There is no express averment in this indictment that Kirby had jurisdiction to assess the property and credits described in the indictment. The averment that he was authorized and required to assess the personal property of John Cunningham means no more than that he was authorized to assess such property belonging to him as was assessable in that township. But it is not shown, either by general averment or by any statement of facts, that the property described was assessable in Crawford township. The materiality of the alleged false statement, therefore, is not shown.

Affirmed.

NOTE.—*The indictment.*—On an indictment for perjury, the alleged perjury consisting of false testimony that at a certain time and place the defendant was offered \$250 by the deceased if he would kill the slayer of the deceased, which was given in evidence on the trial of the slayer for murder, the time, place and details so testified to are not immaterial issues of which perjury could not be predicated. *Henderson v. The People*, 117 Ill. 265.

Formal conclusion.—An indictment for perjury, concluding, "against the peace and dignity of the state of Illinois," is sufficiently formal. The ancient conclusion, "and so the jurors aforesaid, upon their oaths aforesaid, do say," etc., "that the defendant did commit wilful and corrupt perjury," etc., while appropriate, is not material. *Id.*

Words of the statute.—An indictment for perjury need not be in the exact words of the statute, but other words conveying the same meaning may be used; and an indictment in the words of the statute, except that the word "feloniously" is used in place of the word "falsely," is good; especially where it is also averred that the statements sworn to were false, and known to be so by the party making them. *Anderson v. The State*, 104 Ind., 467.

Materiality of matters sworn to.—Where perjury is charged in the making of an affidavit for continuance, the indictment must show "that the swearing was touching matters material to the point in question." *Id.* See, also, *Jacobs v. The State*, 4 Am. Cr. R., 465.

MACKIN V. THE PEOPLE.

(115 Ill., 312.)

PERJURY: *Indictment — Presumption — Witness falsely answering questions which tend to criminate him — Evidence — New trial — Reasonable doubt — Insanity of juror.*

1. **APPEAL — INDICTMENT — PRESUMPTION.**—Where it is alleged that an indictment is invalid because found by a special grand jury when the regular grand jury was still in session, and the record is silent as to the matter, it will be presumed that the indictment was found in the manner the law directs.¹
2. **WITNESS FALSELY ANSWERING QUESTIONS TENDING TO CRIMINATE HIMSELF.**—It is the privilege of a witness to refuse to answer questions before a grand jury, if, in his opinion, the answers would tend to disclose matters that might criminate him; but if he waives such privilege and elects to testify, he must do so with as much truth and candor as if testifying concerning other matters as to which he is bound to answer; and if his testimony is wilfully false, perjury may be assigned upon it.
3. **RESULT OF INVESTIGATION IN WHICH FALSE TESTIMONY GIVEN.**—The guilt of one falsely swearing, in an investigation by a grand jury as to alleged election frauds, does not depend upon the results of the investigation in which it occurred.
4. **ANSWER, IF GIVEN, MUST BE CORRECT.**—Although a question put to a witness may assume that which is incorrect, he is bound, so far as he undertakes to answer it, to speak the truth.
5. **EVIDENCE TO CONVICT — REASONABLE DOUBT.**—In a prosecution for perjury it is not error to instruct the jury to find defendant guilty, "if, from the evidence, they believe him guilty beyond a reasonable doubt."
6. **NEW TRIAL — INSANITY OF JUROR.**—That a juror was insane is not ground for a new trial, when his want of capacity was known to the accused or his counsel when he was accepted.

Writ of error to the Criminal Court of Cook County, Hon. T. A. Moran, Judge, presiding.

George Hunt, attorney-general; *Julius S. Grinnell*, state's attorney, and *Stiles & Lewis*, for the people.

Emery A. Storrs and *John C. Richberg*, for the plaintiff in error.

SCOTT, J. At the January term, 1885, of the criminal court of Cook county the grand jury presented in open court an in-

¹ See note.

dictment against Joseph C. Mackin, charging him with perjury. The indictment contains two counts. Both counts are substantially the same, except the second omits many of the preliminary recitals of the first count. It appears from the averments in the first count of the indictment the judge presiding in the criminal court at the January term, 1885, charged the grand jury to inquire touching certain election matters arising out of a certain election theretofore, and on the 4th day of November, 1884, held for the choosing of certain officers, and among others a senator for the sixth district of the state. It is alleged that, in the investigation that followed, it became and was a matter material in such investigation and inquiry, and a point in question, whether certain false and imitated election tickets or ballots, then shortly before found and discovered in the hands and keeping of the county clerk, in connection and mixed with the returns made by the judges of election in the second precinct of the eighteenth ward, were used, changed and substituted for genuine "tickets and ballots" at such election; and also it became and was a matter material to the point in question whether such false and imitated tickets and ballots had been unlawfully and corruptly substituted for true and genuine tickets and ballots used at the election so held in the second precinct of the eighteenth ward.

It was upon that inquiry and investigation being so made by the grand jury it is alleged it became and was a matter material to the point in question whether defendant did, after the 4th day of November, 1884, to wit, on or about the 21st day of the same month, direct and employ certain persons to engrave and print certain tickets or ballots in imitation of a certain ticket and ballot purporting to be a ticket and ballot such as was, at and before such election, issued by one of the political parties contesting at such election; and also, upon the same investigation and inquiry, it became and was material to the point in question to inquire whether defendant did procure the printing of election tickets or ballots of any kind or description whatsoever on or about the 21st day of November, 1884, and whether he did, on or about that date, obtain and receive from the printers a certain package containing certain tickets or ballots engraved and printed in imitation of a certain ticket and ballot, purporting to be a ticket or ballot such

as was issued and used at such election so held in the second precinct of the eighteenth ward, with the name of Rudolph Brand printed and substituted in the place of Henry W. Lehman. It was in his testimony in relation to these matters then being investigated by the grand jury under the charge of the court that defendant was called as a witness, and in relation to which, after having taken the usual oath administered by the foreman of the grand jury in that which is a judicial proceeding then pending, it is alleged defendant committed wilful and corrupt perjury.

The testimony of defendant before the grand jury, upon which the principal assignments of perjury are based, falls into two divisions: *First*, that he stated in his testimony before that body that he did not direct or employ the printers named to engrave and print the spurious tickets or ballots alleged to have been found in connection and mixed with the genuine tickets used at the election held on the 4th day of November, 1884, in the second precinct of the eighteenth ward; and, *second*, that he did not receive a package from the printers containing the alleged spurious tickets or ballots after the same had been engraved and printed. The assignments of perjury negative these statements in the testimony of defendant with usual fullness in such pleadings.

It appears from the averments in the indictment it was found by a special grand jury. In that respect it is insisted on behalf of defendant there is error in the record. Section 19, chapter 88, Revised Statutes of 1874, provides the judge of any court of record of competent jurisdiction may order a special *venire* to be issued for a grand jury at any time when he shall be of the opinion that public justice requires it. Unless something in the record disclose the contrary, it will be presumed the discretion with which judges of courts of record are clothed in such matters has been well exercised in the interest of public justice.

This much is conceded by counsel; but the objection taken is that at the time the special grand jury in this case was called a regular grand jury, if not in fact in session, was in existence. The fact on which the argument proceeds on this branch of the case nowhere appears in this record. It may be a grand jury had been regularly drawn for that term of court

under the usual forms of law, but as to whether it had been discharged before this special grand jury was called the record is absolutely silent. Every presumption, however, will be indulged to sustain the action of the court. Its action is to be presumed to be regular until it is made to appear otherwise. Nothing to the contrary appearing in this record, the presumption will be indulged that that state of facts existed which clothed the judge with a discretion to call a special grand jury whenever in his opinion it was required in the interests of public justice.

Another point has been elaborately argued that is not found, on examination, to have any existence in the record. It is that the grand jury have no rightful authority under the statute to find an indictment or to make a presentment for perjury upon information of their own body, nor unless upon the testimony of two witnesses. There is nothing in this record to show how the indictment in this case was found,—whether upon the information of the grand jurors themselves, or after hearing testimony of two or more witnesses, or without any testimony at all. As the record is silent in respect to these matters, it will be presumed the indictment was found in the manner the law directs. Any other rule would defeat the administration of public justice.

There is yet another objection of much the same character. It is assumed, as a matter of law, that where a defendant is required by a grand jury to testify touching a criminal charge against him pending before them, and, in pursuance of that request, does testify before them touching such charge, and where an indictment for such an offense is returned by the grand jury against him, it will be set aside; and it is sought to apply the rule stated to the defense being made. This cannot be done. Whether the proposition stated embodies a correct principle of law or not, no opinion need be expressed, for the reason, if correct, it can have no application to the present case. The perjury assigned is not upon any testimony given before the grand jury touching any charge then pending against defendant. No complaint had then been made by any one against him, nor had the court instructed the grand jury to investigate any charge against him. The grand jury had been charged by the court to investigate and inquire touching

certain election matters arising out of a certain election held on November 4, 1884; and it was upon that inquiry defendant gave the testimony upon which the perjury is assigned. It was no more an investigation of a criminal charge against defendant than it was against the printers or engraver who did the work on the alleged spurious tickets or ballots, all of whom testified freely and fully before the same grand jury, and against whom it does not appear any indictments were found for perjury or any other offense. Complaint is made that defendant was asked the direct question whether he ordered the spurious ballots, and whether he received them after they had been engraved and printed. Doubtless the same questions, in substance, were asked of the printers and the engraver, all of whom answered, without hesitation, what connection they had with them. Had defendant been guiltless of any criminal use to be made of such spurious ballots thereafter he could have answered as freely as did the other witnesses, and no one would have pretended any charge against him was being inquired into by the grand jury. Assuming the answers to the question propounded to defendant would have disclosed criminal conduct on his part, it was his privilege to decline to answer, and his refusal could not have been made the basis of any prosecution against him. Of course, no one can be compelled to give evidence against himself, and the law secures to every one, when testifying in any legal proceeding, whether before the grand jury or in the trial court, the privilege to answer, or to decline to answer, if, in his opinion, the answers to the questions would tend to disclose matters that might criminate him. The privilege secured is, however, a personal one, and if he shall waive it, and elect to testify, he must do so with as much truth and candor as if testifying concerning other matters as to which he is bound to answer; and if his testimony is wilfully false, perjury may be assigned upon it. *State v. Maxwell*, 28 La. Ann., 361. It has been held that even where a party is erroneously sworn in his own behalf, perjury might be assigned upon his testimony, if false. *Chamberlain v. The People*, 23 N. Y., 85.

The cases cited by counsel for defendant on this branch of the case are either not analogous or are not in point. The case of *Boyle v. The State*, 17 Ohio, 222, simply holds an indictment

found by a grand jury composed of less than fifteen persons, having the qualifications required by the statute of that state, is not sufficient to put the accused on trial, and that a plea to the indictment that one of the grand jurors did not possess the requisite statutory qualifications is a good plea in bar. The principal point decided in *United States v. Coolridge*, 2 Gall., 364, is that the grand jury, having received the testimony of a person not under oath, the indictment was quashed as having been irregularly found. Whether the doctrine of that case is good law or not, it has no sort of application to the point made in the case being considered. The case of *The State v. Froiseth*, 16 Minn., 296, is not sufficiently analogous in its facts to be an authority in point. In that case, defendant was indicted for receiving greater fees than are allowed by law for his services as justice of the peace, and it was stipulated "the grand jury required the defendant to attend and be examined before them as a witness touching the charge or matters set forth in the indictment, and that in pursuance thereof said defendant did so attend before the said grand jury, and was examined as a witness by them touching the said charge and matters, and that his name is inserted as a witness at the foot of the indictment." It was held the indictment, under the facts as stated under the stipulation, should be set aside. But that is not the case here. There can be no pretense defendant was examined by the grand jury that made the presentment of the indictment against him, touching any charge of perjury that had been made against him. No such question was being considered when his alleged false testimony was given. Other matters were being investigated by the grand jury, and not the charge contained in the present indictment. The case of *United States v. Farrington*, 5 Fed. Rep., 343, has been examined, and it is not thought to be sufficiently analogous, either as to the facts or principles discussed, to be an authority in support of the position taken on behalf of defendant.

Coming now to consider matters that more nearly affect the merits of the case, it is insisted it was error in the court to instruct the jury, as it did, that in determining whether the matters sworn to were material to the matter or question under investigation by the grand jury, it is not necessary for the people, upon the trial of the case, to show that a crime had act-

ually been committed, and that it is sufficient to show the grand jury were investigating an alleged crime, and that such evidence inquired into of defendant by the grand jury was material evidence in such investigation of such alleged crime. It sufficiently appears, from the averments of the indictment, the offense the grand jury had been charged to investigate, and which they were attempting to do, was whether spurious ballots had been substituted for the genuine tickets or ballots cast in the second precinct of the eighteenth ward after the genuine ballots had been returned to the office of the county clerk. That was an offense against public justice, and was a matter within the province of the grand jury to investigate, and to ascertain whether any such frauds had in fact been committed. It was equally important to ascertain no such fraud had been committed in regard to the election, as to learn such fraud had been in fact committed. Any evidence that had tended to establish either theory was material. It was the exact truth of the matter the grand jury had been charged by the court to ascertain. This, of course, could not be done except by the testimony of witnesses called before them,—otherwise there could be no investigation on behalf of the people, and crime would go undetected. An inquest of that character is a legal proceeding under the sanction of the law. Such an investigation would be utterly futile, and even a farce, if witnesses might testify falsely, and no perjury could be assigned on such corrupt and false testimony. There was sufficient ground for suspicion, at least, the election returns had been tampered with,—otherwise the court, it is to be presumed, would not have directed that matter to be investigated. It may have been no more than a mere suspicion so grave an offense had been committed. Even that was sufficient to set the grand jury in motion to inquire into and true presentment make of the matters given them in charge by the court. Their right to investigate did not depend upon the fact the alleged crime they were about to investigate had actually been committed. It was sufficient the grand jury had undertaken to investigate an alleged crime to authorize them to call witnesses before them, and if their testimony given upon such investigation is wilfully and corruptly false, perjury may be assigned upon it, as is done upon false testimony given in any other legal proceedings. It is ob-

vious in such case all testimony material to the matters before the grand jury, which may tend to disclose that an offense has been or has not been committed, is important. Unless witnesses, when called before the grand jury in such cases, can be compelled to speak the truth, it would be impracticable to detect crime. The very object of the inquest is to ascertain whether crime has in fact been committed. In this case it might have been disclosed the election returns had not been corrupted, nor that any criminal use had been made of the spurious ballots that had been engraved and printed. But it was all-important to know that fact, and the grand jury had the clear right to investigate concerning it.

As has been seen, in this case the grand jury had been instructed by the court to inquire touching certain election matters arising out of a certain election held on the 4th day of November, 1884, for the choosing of certain officers, and while pursuing that investigation it became important to ascertain (1) whether spurious tickets or ballots had been substituted for genuine tickets or ballots used at the second precinct of the Eighteenth ward after the same had been returned to the office of the county clerk; and (2) if such a wrong had been done, to ascertain the guilty party or parties. It had been proved spurious tickets in imitation of the genuine tickets had been engraved and printed, and delivered to defendant, and it became material to learn what disposition he had made of them. It was one step in the investigation that might lead to the ascertainment of the truth of the matter being investigated. The grand jury could not know in advance whether any crime had been committed. Concerning that fact it was their duty to inquire. After all, it might turn out the returns made of the election in that particular precinct had not been tampered with, yet defendant's testimony given at that inquest was none the less material for that reason, and if false, perjury might be assigned on it. In *The State v. Schill*, 27 Iowa, 263, it was held, in an indictment for perjury in a criminal investigation before the grand jury, it is not necessary to allege the party charged with the offense that was under investigation was or was not guilty thereof, nor the facts constituting such offense. It was said, in the opinion of the court, the defendant might be guilty of perjury before the grand jury, though the party

whose case was being investigated was innocent, and though in fact no such offense had been committed by him. The case of *The State v. Wakefield*, 73 Mo., 549, declares the same general doctrine, and it was said by the court, in its opinion, "the guilt of one falsely swearing does not depend upon the results of the proceedings in which it occurred."

The instruction given in this case states a correct principle of law. It was not necessary to a conviction of defendant for the people, upon the trial, to show that a crime had actually been committed; yet it was proved beyond any reasonable doubt that over two hundred of the spurious tickets or ballots that had been engraved and printed for the defendant and delivered to him were afterwards found in the package in the county clerk's office, mixed with the genuine ballots.

The refusal of the court to give the second instruction asked by the defendant is said to be error. It is a sufficient answer to the view taken, that the substance of the refused instruction was contained in one that had been given, and it was not the duty of the court to give it a second time.

By the third refused instruction the court was asked to charge the jury on behalf of defendant, that, in determining the question, if, in the testimony offered to show what the evidence of defendant was before the grand jury, it appears that a question was addressed to him involving many points, and he was asked to answer as to the entire question, and the assumption of the question was incorrect or mistaken in any one particular, it was the privilege of the defendant to have answered such question in the negative, and an indictment for perjury could not be sustained to an answer given to such a question. There is no principle upon which the court could have been required to give this charge. Had it done so the obvious effect would have been to mislead the jury. It assumes, by implication at least, what is not true: *First*, that defendant was required to answer the question as an entirety; and *second*, that the guilt or innocence of defendant depended upon his answer to this single question. This is not correct. But, aside from this view, the instruction does not state a correct principle of law. Although the question may have assumed that which was incorrect, still defendant, so far as he undertook to answer it, was obligated to speak the truth.

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It is confidently insisted it was error in the court to refuse the fourth instruction asked by defendant. By that instruction the court was asked to tell the jury, if they believed from the evidence defendant did not, in giving his testimony before the grand jury, say that he did not receive, on or about the 21st day of November, 1884, from the printers a package containing ballots engraved and printed as set forth in the indictment, but did say he received a package from these parties at that place and at that time, and that he did not then know what the package contained, this would not be sustaining the averment as to the language used by defendant when a witness before the grand jury. This instruction is faulty for many reasons. It assumes the guilt or innocence of the accused depends wholly upon a single answer made during his examination. It might be that at one time in his examination he said he did not know what the package contained, and at another time he might have denied he had received any package containing the spurious tickets or anything else; or it might have been proved by other evidence he did know what the package contained. These were all matters for the consideration of the jury, concerning which it was not the province of the court to instruct. The court clearly did not err in refusing that instruction.

A part of the fifth instruction asked by defendant and refused by the court might with great propriety have been given had it been disconnected from that which is positively vicious. It is undoubtedly the law that the evidence upon which the indictment for perjury was based must have been material to the matter then being investigated or the point in question before the grand jury, and that it devolved upon the prosecution not only to affirmatively so state, but to show its materiality. That was done. The materiality of the testimony was averred in the indictment and sufficient proof was made at the trial. It is to be noted the same principle stated in the first clause of this instruction was in fact contained in one that was given, and the accused was in nowise prejudiced because the court did not give it a second time. That which follows this statement of a correct principle of law is a mere argument injected into the instruction and obviously rendered it wholly vicious. The court was asked to say to the jury: "The mere

ordering of spurious ballots and the receiving of spurious ballots, alone, or taken together, are not offenses under the laws of this state, and even had the defendant been guilty of ordering and receiving such ballots, that alone would not have justified an indictment against him." The giving of this paragraph of this instruction would no doubt have warranted the belief in the minds of the jury the accused was indicted for "ordering and receiving" spurious ballots, and to that extent it would have been misleading. No one would insist the mere ordering or receiving spurious ballots, with no intent to make a criminal use of them, would be an offense under the laws of the state. But if it should appear it was intended such spurious ballots should be used in a conspiracy formed to corrupt the election returns already made, then the ordering or receiving of such ballots in the furtherance of such a conspiracy would be an offense, and a very grave one, against the laws of the state. The accused was not indicted, as this clause of the instruction seems to assume, for merely ordering and receiving spurious ballots. That might or might not be an offense, depending upon the fact whether there was a purpose or conspiracy to make a criminal use of them.

In the investigation the grand jury had been instructed by the court to make, it became material to ascertain whether any spurious ballots had been engraved and printed. That was proved. It was next material to discover whether any purpose or conspiracy existed to make any criminal use of such spurious ballots, and if so, who were the guilty parties. One way of proving that was by ascertaining who had ordered the tickets engraved and printed, who had received them, and what disposition was made of them. These facts were all material and vital to the point in question before the grand jury, and when defendant was interrogated concerning them he ought to have spoken truthfully or remained silent, as was his privilege to do. It was upon the alleged false testimony as to whether he had ordered or received the spurious ballots that perjury is assigned. The clause of this instruction quoted has no reference to that offense. It was for that reason highly calculated to mislead the jury, and therefore the whole instruction was properly refused.

Of the additional grounds of error suggested on the oral ar-

gument of the case, one is, as to all of the instructions given on behalf of the people, that they permitted the jury to find defendant guilty, "if, from the evidence, they believed him guilty beyond a reasonable doubt." Of the correctness of this form of an instruction no doubt is expressed, as it is generally used. The same expression is used in all the instructions asked on behalf of defendant in this case. It seems, however, to be claimed it is erroneous in cases of perjury where more than the evidence of one witness is required to convict. Originally, the rule was that in order to convict a person of perjury there must be two witnesses swearing directly adversely from the defendant's oath upon which the perjury was assigned. But the strictness in that regard has long since been relaxed, and text writers now hold, on the authority of the adjudged cases, the rule formerly observed must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by defendant; for if any material circumstance be proved by other witnesses in confirmation of the witness who gave the direct testimony of the perjury, it may turn the scale and warrant a conviction. 1 Greenl. Ev., § 257; 2 Russ. Cr., 650. It is said it is upon such evidence the jury must find the guilt of the accused beyond a reasonable doubt. That is undoubtedly true; but it is not necessary to state in every instruction the degree or quantity of evidence indispensable to a conviction for perjury, nor to state the rule of evidence in such cases in connection with the usual formula, no conviction can be had unless the accused is proved guilty beyond a reasonable doubt. It may be stated in a separate instruction, if the accused desires to have the jury so instructed.

The alleged variance between the averments in the indictment and the proof does not exist. It is charged in the indictment the spurious ballots were ordered and received from S. B. Wright and W. H. Wright. The insistence is, such ballots were ordered and received from S. B. Wright alone, if so ordered or received at all. That is not the fact. Both the Wrights were present when the ballots were ordered and both were interested in doing the work, and it is therefore true, in law and in fact, the spurious ballots were ordered from both of them. It is also proved past any doubt that both of them

were present when the package containing the spurious tickets or ballots was delivered to defendant.

Lastly, it is insisted the evidence is not sufficient to warrant the conviction of the accused, and the reason stated in support of that position is that only one witness swore to the facts upon which the perjury is assigned. This is a misapprehension of the evidence. There is the testimony of more than two witnesses swearing directly to the fact the accused ordered spurious tickets or ballots to be engraved and printed. There is also the testimony of two witnesses to the other fact upon which perjury is assigned, that the package said to contain the spurious tickets or ballots was delivered to defendant. As respects the contents of the package, there is the direct testimony of one witness, and such corroborating testimony as leaves no reasonable doubt on the mind, it contained the spurious tickets or ballots that had just that afternoon been printed in such great haste by the parties delivering such package, and at the request of the defendant himself. Without entering upon any critical analysis of the evidence, it is sufficient to say it has been closely examined, and in the opinion of this court it fully warrants the conviction of the accused.

After the verdict of guilty was rendered a motion for new trial was made. One cause assigned in support of that motion was that one of the jurors impaneled to try the cause, and who sat in the case, was of unsound mind. Touching the mental capacity of the juror quite a good deal of testimony was introduced, but the court was of opinion the juror was competent, and the objection was accordingly overruled. It would seem to be a sufficient answer to the position taken, it does not appear from any affidavit or otherwise the mental condition of the juror was not as well known to defendant or his counsel before he was accepted by them on the panel as afterwards. If a disqualification of a juror was known to either of them before he was accepted, it cannot be assigned for error after verdict. The law on this subject is so well settled, the point need not be elaborated. *Swarnes v. Siltou*, 58 Ill., 155; *Fitzpatrick v. The People*, 98 id., 269. But aside from this view of the law, it does not appear, from the testimony

introduced in support of the motion for a new trial, the mind of the juror was so seriously impaired as to render him incompetent. Two physicians that had practiced in his family, and perhaps treated him, never discovered any disorder in his mental faculties. It seems not to have occurred to the jurors that sat with him, he was a man of unsound mind, or that he was in any way deficient in his reasoning powers or memory. It is no doubt true that at times he was eccentric, and much inclined to exaggerate, particularly as to his money, and his bonds or government securities. Very few, if any, of his neighbors seem to have credited his statements in that respect, and it is shown they were really untrue. But there is no satisfactory evidence that his mind was so much affected as to disqualify him as a juror, and there was no ground for granting a new trial for that reason.

Every phase of this case, and every point made for a reversal, has been most carefully and patiently considered, and no error has been discovered, nor has any been pointed out, of sufficient gravity to warrant the reversal of the judgment. Judgment affirmed.

NOTE.—Presumptions as to regularity of proceedings.—When it appears that inferior courts have jurisdiction, the same presumptions are indulged in favor of the regularity and validity of their proceeding as in case of courts of general jurisdiction; and where the record is silent as to whether a plea was interposed in a criminal prosecution before a justice, it will be presumed that there was such a plea before trial. *Jones v. The State*, 104 Ind., 557.

Appeal from justice.—Where a case is appealed from a justice of the peace to the circuit court, in the absence of anything to the contrary, it will be presumed, in favor of the jurisdiction of the circuit court, that the case came into that court by a regular appeal. *Unruh v. The State*, 105 Ind., 117.

AUGUST SPIES AND SEVEN OTHERS V. THE PEOPLE.¹

(In the Supreme Court of Illinois. Opinion filed September 14, 1887.)

THE ANARCHIST CONSPIRACY MURDER CASE.

1. ACCESSORIES BEFORE THE FACT AND PRINCIPALS.—While it is conceded that no one of the defendants threw the bomb with his own hand which caused the death of officer Degan, the statute of Illinois abolishes the distinction between accessories before the fact and principals, and under it all accessories before the fact are made principals. If, therefore, the defendants advised, encouraged, aided or abetted the killing of Degan, they are as guilty as though they took his life with their own hands.
2. CONSPIRACY DEFINED.—A conspiracy may be defined in general terms as a combination of two or more persons by some concerted action to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not necessary, however, that the accused should have been an original contriver of the mischief, *for he may become a partaker in it by joining the others while it is being executed.* If he concur, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected the offense of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from the other facts proved; in other words, may be established by circumstantial evidence.
3. ITS EXISTENCE ESTABLISHED BY THE EVIDENCE.—The evidence in the record amply sustains the charge that the defendants were engaged in a great conspiracy to overthrow the law, and that the throwing of the bomb in Hay-market square on the evening of May 4 was the direct result of that conspiracy. First, there was at that time existing in Chicago an organization of socialists or anarchists whose purpose was the overthrow of all laws which were enacted for the protection of private property. This overthrowal was to be accomplished by force. The organization was a national one, divided into some eighty groups, of which seven are mentioned as located in Chicago. Schwab, Neebe and Lingg belonged to the North side group; Engel and Fischer to the Northwest; Spies, Parsons and Fielden to the American. Connected with these groups were armed sections, the Lehr und Wehr Verein, containing one thousand drilled men, and these soldiers were known by numbers instead of names, desire for secrecy being so great. The other armed sections were to be commanded by details from the Lehr und Wehr Verein if called into action. The proof shows that it was this organization which called the meeting of May 4, during which the bomb was thrown.

¹ A condensed statement of facts in this case and all the instructions of the court (Hon. Joseph E. Gary, Judge) are published in Vol. 5, Am. Cr. Rep., pp. 637 to 654.

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4. THE MURDER OF DEGAN WAS IN PURSUANCE OF THIS CONSPIRACY.—

The main feature of the Monday night plan was the provision for throwing a bomb into each police station and then shooting down the policemen as they would come out. This provision had two parts: First, a bomb was to be thrown, creating destruction and confusion; second, in the midst of the confusion following upon the explosion of the bomb, the members of the armed sections and the riflemen of the Lehr und Wehr Verein were to fire into the policemen and destroy them before they could recover from their surprise, and it is apparent from the evidence that just such an attack was made at the Hay-market as was contemplated and arranged for by the conspiracy of Monday night. First, a bomb was thrown among the policemen; next, shots were fired into their ranks by armed men, belonging to the organizations. If a bomb had been thrown into the station itself and the policemen had been shot while coming out, a part of the conspiracy would have been literally executed just as it was agreed upon. It could make no difference in the guilt of those who were parties to the conspiracy that the man who threw the bomb and his confederates who fired the shots waited before doing their work until the policemen in the station had left it and had advanced some three hundred feet north of it.

5. DEPARTURE FROM THE LINE OF ACTION AGREED UPON, NO EXCUSE.—A

man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally through some other specific or a general evil purpose. *When, therefore, persons combine to do an unlawful thing, if the act of one proceeding or growing out of the common purpose terminates in a criminal result, though not the particular result meant, all are guilty.* Where there is a conspiracy to accomplish an unlawful purpose, and the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator, although the conspirator who does the act cannot be identified or discovered.

6. ACTS AND DECLARATIONS OF CONSPIRATOR.—It is well settled that,

when the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all. And as the existence of a conspiracy in any particular case is an inference to be drawn by the jury from all the facts and circumstances in evidence, the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Acts and declarations of a conspirator after the offense is committed may be received against the party making them, but not against his co-conspirators.

7. NEWSPAPER ARTICLES.—All the defendants in this case are proven to

have belonged to the illegal organization above specified. Hence, they were all co-conspirators. The speeches and newspaper articles were in furtherance of the common design. Being the acts and declarations of some of the conspirators, they are the acts and declarations of all of them. How far the formation and execution of this conspiracy may have been aided and encouraged by the printed and spoken utterances

of the particular defendants here named was a proper matter for the jury to consider in the light of all the other circumstances developed by the testimony in this case.

8. **HERR MOST'S BOOK.**—Herr Most's book, so-called, was a voluminous, incendiary, outrageous publication going into the detail of the manufacture of explosives and arms and the manner of preparing them, filled with vile suggestions as to how to apply the results of modern science to the work of destruction of the capitalistic system, abounding in advice to persons who, as members of the so-called revolutionary forces, might purpose to engage in the use of these weapons and explosives. Its distribution among the members of the International groups at their picnics and meetings through the agency of the International Association, to which the defendants belonged, is proven beyond controversy. It was then proper evidence for the consideration of the jury.
9. **INSTRUCTIONS.**—The instructions in this case reviewed and found to be unobjectionable when taken and construed together.
10. **REASONABLE DOUBT.**—The portion of the charge relating to reasonable doubt to which complaint is made is that which is contained in the following words: "You are not at liberty to disbelieve, as jurors, if, from the evidence, you believe as men." This expression has been sanctioned by the supreme court of Pennsylvania as having been properly used in an instruction given to the jury by a trial judge, and this court is inclined to follow the ruling there laid down.
11. **JURORS ACCEPTED BY DEFENDANTS AFTER EXHAUSTING ALL PEREMPTORY CHALLENGES.**—In this case it is held that it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges; that unless objection is shown to one or more of the jury who tried the case, the antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and set aside will not be inquired into on error.

Geo. Hunt, Julius S. Grinnell, Geo. C. Ingham, Francis W. Walker and Edmund Furthman, attorneys for the people.

William P. Black, Leonard Sweett and Salomon & Zeisler, for the plaintiffs in error.

Opinion by MAGRUDER, J. This case comes before us by writ of error to the criminal court of Cook county. The writ has been made a *supersedeas*.

Plaintiffs in error were tried in the summer of 1886 for the murder of Matthias J. Degan, on May 4, 1886, in the city of Chicago, Cook county, Illinois. On August 20, 1886, the jury returned a verdict finding the defendants August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg guilty of murder, and fixing death as the penalty. By the same verdict they also found

Oscar W. Neebe guilty of murder and fixed the penalty at imprisonment in the penitentiary for fifteen years.

About the 1st day of May, 1886, the workingmen of Chicago and of other industrial centers in the United States were greatly excited upon the subject of inducing their employers to reduce the time, during which they should be required to labor on each day, to eight hours. In the midst of the excitement growing out of this eight-hour movement, as it was called, a meeting was held on the evening of May 4, 1886, at the Haymarket, on Randolph street, in the west division of the city of Chicago. This meeting was addressed by the defendants Spies, Parsons and Fielden. While the latter was making the closing speech, and at some point of time between 10 and half-past 10 o'clock in the evening, several companies of policemen, numbering one hundred and eighty men, marched into the crowd from their station on Desplaines street, and ordered the meeting to disperse. As soon as the order was given some one threw among the policemen a dynamite bomb, which struck Degan, who was one of the police officers, and killed him. As a result of the throwing of the bomb and of the firing of pistol shots, which immediately succeeded the throwing of the bomb, six policemen besides Degan were killed, and sixty more were seriously wounded.

It is undisputed that the bomb was thrown and that it caused the death of Degan. It is conceded that no one of the convicted defendants threw the bomb with his own hands. Plaintiffs in error are charged with being accessories before the fact. There are sixty-nine counts in the indictment. Some of the counts charge that the eight defendants above named, being present, aided, abetted and assisted in the throwing of the bomb; others that, not being present, aiding, abetting or assisting, they advised, encouraged, aided and abetted such throwing. Some of the counts charge that said defendants advised, encouraged, aided and abetted one Rudolph Schnaubelt in the perpetration of the crime; others, that they advised, encouraged, aided and abetted an unknown person in the perpetration thereof.

The Illinois statute upon this subject is as follows (ch. 38, div. 2, secs. 2 and 3):

"Sec. 2. An accessory is he who stands by and aids, abets,

or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages shall be considered as principal and punished accordingly."

"Sec. 3. Every such accessory, when a crime is committed within or without this state by his aid or procurement in this state, may be indicted and convicted at the same time as the principal, or before or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal."

This statute abolishes the distinction between accessories before the fact and principals; by it all accessories before the fact are made principals. As the acts of the principal are thus made the acts of the accessory, the latter may be charged as having done the acts himself, and may be indicted and punished accordingly. *Baxter v. People*, 3 Gilm., 368; *Dempsey v. People*, 47 Ill., 323.

If, therefore, the defendants advised, encouraged, aided or abetted the killing of Degan, they are as guilty as though they took his life with their own hands. If any of them stood by and aided, abetted or assisted in the throwing of the bomb, those of them who did so are as guilty as though they threw it themselves.

It is charged that the defendants formed a common purpose, and were united in a common design to aid and encourage the murder of the policemen among whom the bomb was thrown. If they combined to accomplish such murder by concerted action, the ordinary law of conspiracy is applicable, and the acts and declarations of one of them, done in furtherance of the common design, are, in contemplation of law, the acts and declarations of all. This prosecution, however, is not for conspiracy as a substantive crime. Proof of conspiracy is only proper so far as it may tend to show a common design to encourage the murder charged against the prisoners. It may be introduced for the purpose of establishing the position of the members of the combination as accessories to the crime of murder.

The questions which thus present themselves at the threshold of the case are these: Did the defendants have a common pur-

pose or design to advise, encourage, aid or abet the murder of the police? Did they combine together and with others with a view to carrying that purpose or design into effect? Did they or either or any of them do such acts or make such declarations in furtherance of the common purpose or design, as did actually have the effect of encouraging, aiding or abetting the crime in question?

The solution of these questions involves an examination of the evidence.

The first inquiry which naturally presents itself is, who made the bomb which killed Degan?

First. The bomb was *round*. Zeller, a witness for the defense, says of it, as he saw it going through the air: "It seems to me it was more round and about as big as a base-ball." Taylor, another witness for the defense, says: "I saw the bomb enough to know it was a round bomb."

There is much evidence in the record as to the different kinds of bombs and as to the mode of their construction. The simplest and cheapest form is what is known as the gas-pipe bomb, the mode of constructing which is hereafter explained. The gas-pipe bomb is the one which the ordinary, unskilled laborer would be most apt to make, if he desired to use such a weapon.

The round bombs, however, are more expensive, and their construction is more difficult and more liable to discovery. Such a bomb consists of two semi-globes, which, if made of iron, must be obtained at a foundry, or if made of zinc or other material, require the use of brass or clay molds and facilities for melting the metals entering into their composition. The semi-globes must be fastened together by solder or by bolts. Holes must be drilled for the insertion of the bolts and also for the insertion of the caps and fuse. Care must be taken to fill in the dynamite properly and to insert the fulminating cap into the dynamite and the fuse into the cap. The construction of such bombs requires time and skill and involves considerable expense in the purchase of materials.

Second. The bomb thrown at the Hay-market was exploded by means of a *projecting fuse*, ignited before leaving the hand by a match or a lighted cigar. This abundantly appears from the evidence of those who saw it before it fell. One witness

says it was like a fire-cracker in the air; another, that "it was like a burnt out match, that was lit yet;" another, that it was a "streak of fire" in the air; still another calls it "a little tail of fire quivering in the air."

As we understand the evidence in regard to the mode of constructing a round bomb with a fuse, the method is as follows: When the two semi-globular shells are fastened together, and the dynamite is filled in through an opening made for that purpose, a fuse six or eight inches long is inserted in a detonating cap; the cap is pinched so as to hold the fuse; the cap is then inserted about two-thirds of its length into the dynamite through the opening, and five or six inches of fuse are left to project outside of the bomb.

There are bombs which do not have the projecting fuse. When explosion is desired from a distance, a wire and electric battery are used. A primer bomb has a percussion cap on each side, so that, when it is thrown, "whichever side strikes will explode the cap." Another kind of bomb is described in the testimony as having the appearance of a fruit-can, containing a glass tube connected with the top by a screw, and so fixed as to explode when thrown against a hard substance.

The bomb with a projecting fuse of six or eight inches is made to be thrown into a crowd of men and when "only a few minutes are desired to get away," and "only so much fuse is required as can burn in the interval of throwing." When the fuse projects in the manner indicated it is necessary to apply a light externally to the end of the fuse before the bomb is thrown.

Third. The shell of the bomb which exploded was of *composite manufacture*. Pieces of the shell were taken by the physicians from the body of Degan and from the body of officer Murphy, who had fifteen shell wounds. These pieces were subjected to chemical examination, and were found to be composed of tin and lead, with traces of antimony, iron and zinc. The Degan piece contained slightly more tin than the Murphy piece, but the ingredients of the two pieces were exactly the same. The chemists who made the analysis here referred to, and who have given their testimony in relation to the same, swear that there is no commercial substance which has the same composition as these pieces of shell. Commercial lead,

they say, never contains tin. Solder is composed of tin and lead, but the proportion of tin in solder to the amount of lead therein is so different from the proportions of those ingredients in the pieces of shell so analyzed that the latter could not have been made of solder. Experiments also demonstrated that the exploded bomb could not have been made out of old lead-pipe that had been plugged or mended with solder. The proportions of lead and tin in such case are vastly different from their proportions in the pieces of the bomb which were subjected to examination. In the latter, lead was the basis of the preparation, but tin, or some other metal containing tin, was mixed with the lead.

Fourth. The bomb which exploded had upon it a small *iron nut*. One Michael Hahn was standing on the northwest corner of Desplaines and Randolph streets when the bomb exploded at the Hay-market meeting, and was struck by a part of it. On the morning of May 5, 1886, a surgeon extracted from his body an iron nut, threaded in the circular opening through its center, so as to fit upon the screw end of a bolt, of which it had evidently been a part. The discovery of this nut points unerringly to the conclusion that the two semi-globular halves of the exploded bomb had been fastened together by a bolt and had not been soldered together. The evidence shows that soldering was the usual method of fastening together the two halves of the round bomb.

The four characteristics of the exploded bomb, which have been thus indicated, were found to exist in the bombs which were made by the defendant Louis Lingg.

First. Many of the bombs made by Lingg were *round or globular* in form. The defendant Lingg came to this country for the first time in the summer of 1885 from some place in Germany. In August of that year he became acquainted with William Seliger, a German carpenter who had resided in America three years and a half. Two weeks before Christmas, 1885, he went to board and room at Seliger's house, No. 442 Sedgwick street, in the North division of the city of Chicago. More than six weeks before May 1, 1886, he brought a bomb to the house and said he was going to make bombs. Some six weeks before that date, or about the middle of March, 1886, he brought dynamite there. He had three different kinds of

dynamite. He had no regular employment for about four weeks prior to May 1, 1886. During this time he was experimenting with dynamite, and with round and long or gas-pipe bombs. He exploded the latter in the woods north of the city, and "says he put one right in the crotch of a tree and slit it all up." During a period of six weeks prior to May 1, 1886, he was at work from time to time making semi-globular bombshells, and was often assisted in this work by Seliger and by two men named Thielen and Hermann or Heumann. These semi-globes appear to have been all finished before May 4, 1886, and, of course, were intended for round bombs, the only kind in the construction of which such shells were used. After Lingg's arrest, round bombs were found in a trunk in his room and under a sidewalk on Sigel street, where he is proven to have hidden them, and in the possession or under the control of one Lehmann, to whom he is proven to have given them. It thus appears that the exploded bomb corresponded in shape and form with many of the bombs made by Lingg.

Second. The bombs made by Lingg had the *projecting fuse* so as to be exploded by the external application of fire.

On April 30, 1886, being the Friday before the day of the Hay-market meeting, Lingg brought to Seliger's house a large wooden box, about three feet long, from sixteen to eighteen inches high and from sixteen to eighteen inches broad, inside of which was a tin box containing dynamite. On the next Tuesday, May 4, 1886, he was occupied during the afternoon and until after 7 o'clock in the evening, in filling this dynamite into gas-pipes and globular shells, using a flat piece of wood which he had made for that purpose. He was assisted in his labors by a number of persons, and among these were Seliger, Thielen, and Hermann, already mentioned, and two men named Huebner and Munsenberg or Muensenberger, the latter of whom was probably the blacksmith hereafter referred to. Upwards of fifty bombs were finished that afternoon, and the work on them would appear to have been continued up to or beyond the hour on that evening for which the Hay-market meeting had been called, as hereafter stated. The rooms in Seliger's house which were used by Lingg and his assistants for their work are spoken of as the front room and the bedroom. The witness Lehmann visited these rooms twice on Tuesday afternoon in

company with a countryman of his, a Prussian named Smideke, who went there with him to buy a revolver. His first visit was made at 5 o'clock in the afternoon, at which time he saw there Lingg, Seliger, Huebner, and a person of whom he speaks as follows: "One whose name I did not know; it is said that he is a blacksmith." They were in the bedroom and each had a cloth tied around his face, but the witness "could not precisely see what they were doing."

The second visit was made to the rooms at 7 o'clock in the evening, and lasted about ten minutes. At this time Lehmann did not get into the bedroom, but they were busy there as at the first visit. He saw Huebner working at some *coil of fuse* which looked like strings or white cord; he was cutting it into pieces; they were putting fuse into caps in the front room. During one of these visits Lingg gave to Lehmann a small leather hand-satchel or trunk, which the latter took home and placed in his woodshed, and at 3 o'clock next morning, after he had learned of the destruction wrought at the Hay-market, carried "away to the prairie," there burying its contents. The satchel contained a tin box or can nearly full of dynamite, and three *round* bombs, some caps, and *two coils of fuse*. Another circumstance may be mentioned in this connection. After 10 o'clock on Tuesday night, when Lingg and Seliger were on Larrabee street, just south of North avenue, in the North division of the city, a patrol wagon passed them, which was manned with policemen, and had been summoned to the Hay-market by a call through the telephone. Lingg proposed to throw among the policemen in the wagon a bomb, which he had about his person, and, for the purpose of exploding it, demanded a light from Seliger, who was smoking a cigar at the time. It thus appears that the bombs made by Lingg were made with the projecting fuse, and so correspond with the second feature of the exploded bomb, as already noticed.

Third. The shells of the round bombs made by Lingg were constructed of *composite metal*.

Their correspondence in this particular with the shell of the exploded bomb tends very strongly to show that the same hand which made them also made the exploded bomb. Lingg, Seliger, Thielen and Hermann were frequently engaged in "melting and casting" in Seliger's kitchen during the six

weeks before May 1, 1886. Lingg melted lead or some other metal in a ladle on the kitchen stove. A pan is identified as one which was used by him in making the semi-globes found in his round bombs. He also made use for such purpose of clay molds, constructed by himself. One of these clay molds could only be used twice.

Pieces of bomb-shells proven to have been made by Lingg in the manner and with the materials here indicated were subjected to chemical analysis. They were composed of a certain percentage of tin, and the remainder was lead, with traces of antimony, iron and zinc. Out of four bombs examined, the percentage of tin in the different bombs varied slightly in three, and in the fourth considerably more than in the other three. As a result of the chemical analysis, the piece of shell taken from Degan's body and the pieces of the shells discovered in Lingg's possession after his arrest were shown to be composed of exactly the same ingredients.

After May 4 there were found in Lingg's room a metal cup, a cold chisel, a file, shells, loaded cartridges, "metal and also some lead," "some babbitt-metal, some sheets of lead," bolts, pieces of metal in a Japan dinner box with four dynamite gas-pipe bombs, two loaded and two empty, a Remington rifle, a round dynamite bomb, loaded, two pieces of solder, a blast hammer and a smaller pointed hammer, a couple of iron bolts and drills, a two-quart pail with sawdust in the bottom, a tin quart basin with fuse and sawdust or dynamite in it, two long cartridges of dynamite and some fuse already fixed, fuse about four-inches long and caps, a big coil of fuse in the trunk, a piece of block tin, a piece of candlestick. Babbitt-metal is an alloy of copper, tin, and zinc. Many of the articles found were chemically analyzed. The candlestick or toy proved, upon analysis, to contain tin, lead, antimony, zinc and a trace of copper. All the ingredients necessary to make up the composite material, out of which the exploded shell was constructed, were thus discovered to be in Lingg's possession.

The shell of the globular bomb, if entirely of lead, would be soft and yielding, and on this account would fail to furnish that degree of resistance to the dynamite which appears from the evidence to be necessary in order to make the explosion effective. It was evidently for this reason that some other

substance, such as tin, was combined with the lead to give the shell a firmer consistence and make its effect more deadly. With the same end in view, nails and wire, as will be hereafter seen, were recommended by the defendant Engel to be put around the gas-pipe bombs.

It appears that of the bombs made by Lingg which were analyzed, each differed slightly from the others in the amount of tin, though all contained the same ingredients. It also appears that the two halves of the same bomb would differ somewhat in the proportions of the metal present, and this accounts for the fact that the piece from Degan's body contained a very little more tin than the piece from Murphy's body, each evidently coming from a different half of the bomb.

These slight differences are such as would naturally be expected, when shells were made with the rude materials with which Lingg worked, melting his metals in a small ladle on a kitchen stove, casting half a shell at a time, making use of clay molds made by himself, each one of which could only be used twice.

Fourth. The semi-globular halves of each round bomb made by Lingg were fastened together by a bolt, upon one end of which was screwed a *small iron nut*, showing a remarkable correspondence between the Lingg bombs and the exploded bomb in the fourth peculiarity of the latter, which has been heretofore mentioned.

On the morning of Tuesday, May 4th, Lingg left Seliger's house to go to a meeting on the West side and did not return until 1 o'clock in the afternoon. Before leaving he instructed Seliger to go to work at the bombs, remarking that they would be taken away that day. He gave Seliger a bolt, and said "that he had not enough of those bolts," and told him to go to Clybourne avenue and "get there some that he had already spoken to the man about." About fifty of the bolts were procured in accordance with the directions thus given. Seliger was engaged in the forenoon in drilling holes in the shells already on hand for the bolts to pass through. He was chided by Lingg, upon the latter's return, for having progressed so slowly with the work, and was informed that they would "have to work very diligently during the afternoon."

The evidence shows that the bolt used by Lingg was a me-

tallic pin running through the bomb, that a head was formed on one end of this pin, and on the other end there was cut a thread upon which was screwed a movable piece called a nut, the head at one end and the nut at the other holding the two semi-globes together. These bolts were found in the bombs afterwards taken from the possession of Lingg, and proven by the undisputed testimony in the case to have been made by him.

The nut taken from the body of Hahn, and which was a part of the exploded bomb, was applied to the threaded end of one of the bolts taken from a bomb made by Lingg and was found to fit it exactly. This cannot be regarded otherwise than as a circumstance of very grave significance.

In view of the considerations thus far presented, and of others which will suggest themselves as the examination proceeds, we think the jury were warranted in believing from the evidence that the bomb which killed Degan was one of the bombs made by the defendant Lingg.

This conclusion receives indorsement from the fact that the making of such bombs as have been described is a new, unusual and dangerous occupation. There are no bomb manufactories. A bomb is not an article which can be bought in the market like a revolver. He who would use such a weapon must make it himself.

According to the evidence in this record dynamite is composed of nitro-glycerine and clay or sawdust; it must be handled with care; it will explode if subjected to too great a degree of heat; it should not be exposed to the rays of the sun, or placed too near the fire; if kept for any length of time it must be stored with caution; for instance, it is recommended that it be wrapped in oil paper, placed in a box of sawdust and buried in the cellar; when, in handling it, it gets upon the skin, headache is produced; if its dangerous gases are inhaled, frightful pains in the head will be the result. Moreover, information as to its peculiarities and as to the safest mode of handling it is limited and to some extent not accessible.

For these reasons so hazardous a business as filling bombshells with dynamite will rarely be engaged in. Hence, when a murder is the result of the explosion of a dynamite bomb, and about the time of the murder a man is found making such bombs near the scene of the explosion, his responsibility for

the crime, viewed in connection with other criminating circumstances which may exist, will be a more natural inference than where some more common weapon of destruction has been used.

The next question to be considered is, why did the defendant Lingg make the bomb which killed Degan?

In order to satisfactorily answer this question it becomes necessary to examine the character and purposes of an association with which all the defendants in this case were connected.

The record shows the existence of an organization known as the International Workingmen's Association, or the International Arbeiter Association, generally called the "Internationals," and sometimes designated for brevity as the I. A. A.

The platform or declaration of principles adopted by this organization was published by a certain bureau of information and by certain newspapers, called the "Alarm" and the "Arbeiter Zeitung," which are more particularly referred to hereafter. It appeared in all the issues of the latter paper during the months of February, March and April, 1886. It is too long for insertion here. It urges that the present system, under which property is owned by individuals, should be destroyed, and that all capital which has been produced by labor should be transformed into common property. It says: "It is only when capital is made common and indivisible that all can be made to partake fully and freely of the fruits of common activity; only by the impossibility of acquiring individual (private) capital can every one be compelled to work who claims the right to live." It charges that the government, the law, the schools, the churches, the press, are in the pay and under the sway of the property-owning and capitalistic classes, and that the laboring classes must achieve their deliverance through their own strength.

This International platform thus addresses the workingmen: "As in former times no privileged class ever relinquished its tyranny, no more can we take it for granted that the capitalists of the present day will forego their privileges and their authority without compulsion. . . . It is therefore self-evident that the fight of proletarianism (the laboring classes) against the bourgeoisie (the middle classes) must have a violent

revolutionary character, and that mere wage conflicts can never lead to the goal. We could show, by numerous illustrations, that all attempts which have been made in the past to do away with the existing monstrous social system through peaceable means, for example, through the ballot-box, have been entirely useless and will be so in the future. . . . We know, therefore, that the ruling class will not voluntarily relinquish their prerogative and will make no concessions to us. Under all these circumstances there is only one remedy left — force. . . . Therefore it is your right, it is your duty, says Jefferson, to arm yourselves. Agitation, with a view to organization, organizations for the purpose of rebellion; herein is indicated in a few words the way which workingmen must take if they would rid themselves of their chains."

It is here admitted that the property of each individual in the community could not be taken away from him and put into a common fund to be divided among all the members of the community without a resort to revolution and force. The way to the result sought to be reached by the International platform here referred to leads, through the crimes of robbery, theft and murder, to the destruction of the existing system of social order and of all the laws and institutions upon which that system is based.

The association whose principles are thus outlined in its platform was divided into groups, of which there were eighty in the United States in March, 1885, located principally in the centers of industry. For some time prior to May 1, 1886, there was a number of these groups in Chicago. The following are spoken of by different witnesses: The North side group, which met at No. 58 Clybourne avenue in the north division of the city; the Northwest side group, which met at Thalia Hall, No. 636 Milwaukee avenue, in the northwestern part of the city; the American group, which met generally at No. 54 West Lake street, in the west division of the city, but sometimes at Baum's Pavilion at the corner of Cottage Grove avenue and Twenty-second street in the south division of the city, and at No. 45 North Clark street, No. 106 Randolph street, and on the lake front; the group "Karl Marx," which met at No. 63 Emma street in the west division; the group "Freiheit," which met on Sherman street in the south division; the Southwest

side group, which met at No. 611 Throop street in the southwestern part of the city; the group, "Jefferson No. 1," which met at No. 600 Milwaukee avenue.

The defendants Schwab, Neebe and Lingg belonged to the North side group, the defendants Engel and Fischer to the Northwest side group, and the defendants Spies, Parsons and Fielden to the American group. Spies had also belonged to the Northwest side group.

The members of these groups were known by numbers and not by names. The members of the North side group began to be known by numbers in July, 1884. The number of the witness Seliger, who belonged to the North side group, was 72. Certain members of these groups were armed with rifles and drilled regularly once a week at their respective places of meeting, taking their rifles home with them after drill. These armed members were known and designated as the "armed sections" of the groups. The North side group met every Monday night at 58 Clybourne avenue and the armed section drilled there every Sunday morning. The armed section of the American group met every Monday evening at No. 54 West Lake street. The Northwest side group met Thursday evening at No. 636 Milwaukee avenue. The Southwest side group met every Saturday evening at No. 611 Throop street.

There was also a certain armed socialistic organization called the Lehr und Wehr Verein, whose members seem to have been members also of the International groups, but to have been of a higher rank and to have attained a higher grade in the perfection of their drill than was the case with the ordinary members of the "armed sections." The evidence does not disclose the exact number of those who belonged to the Lehr und Wehr Verein at the time of the trial, but in 1879 it had one thousand men. Its members were armed with Springfield rifles and were known by numbers. They conducted their drills and military exercises at Thalia Hall, No. 636 Milwaukee avenue, where the Northwest side group, the most radically anarchistic of all the groups, held its meetings.

The Lehr und Wehr Verein had four companies in Chicago. The witness August Krueger, whose number was 8, was orderly sergeant and corresponding secretary of the second company. Godfried Waller, whose number was 19, and Bernard

Schrade, whose number was 32, were members of this second company. Schrade also belonged to the Northwest side group, and says they drilled once a week and kept their Springfield rifles at home. The third company seems to have had a drill every Thursday evening at a workingmen's hall on West Twelfth street.

The "armed section" of the American group was called the "International Rifles." After one of its drills on August 24, 1885, at No. 54 West Lake street, ten men, dressed in blue blouses and each armed with a Springfield rifle, and who belonged to the first company of the Lehr und Wehr Verein, were introduced into the room and drilled for the benefit of the new members of the "International Rifles." It was then and there stated, that, in case of a conflict with the authorities, the International Rifles were to act in concert with the Lehr und Wehr Verein and obey the orders of its officers. From this it would appear that the Lehr und Wehr Verein or its officers were to direct the movements of the ordinary "armed sections," when occasion should require.

In the spring of 1885 there were in the city of Chicago three thousand of these armed socialists, of whom the defendant Parsons then said that "they were well armed with rifles and revolvers and would have dynamite and bombs when they got ready to use them." As they were known by numbers no record was kept of their names, and a system was adopted by which the members would be as little known to each other as possible.

These groups were represented by a general committee composed of delegates from all the groups of the International Association in Chicago. This committee met every two weeks in a building in the South division of the city, known as No. 107 Fifth avenue, and called by the witnesses the "Arbeiter Zeitung Building," or the building of the International Arbeiter Association. The meetings of this committee were held in a library-room which is spoken of by one of the witnesses as belonging to the Arbeiter Zeitung newspaper herein-after mentioned, and which was located in the rear of the office-room of that paper. In August, 1885, at the time of what is called the "car-drivers' strike," the witness Seliger was present in this room as a delegate from the North side

group to the meeting of the general committee, and speaks of the defendant Spies as being there present on that occasion.

The members of the general committee had been in the habit of meeting in this library-room for a number of years, certainly since 1880. One Hirschberger was the librarian.

An exception should be made to the statement that all the groups appointed delegates to the general committee. The Northwest side group did not do so, and the reason given for this by Fricke, who was at one time a member of that group and for two years book-keeper of the Arbeiter Zeitung, was, that the principles of the Northwest side group were more strongly anarchistic than those of the other groups. It was called an "autonomous" group.

A newspaper called the Arbeiter Zeitung, and conducted in the interest of the German-speaking groups of the International Arbeiter Association, was published in the building No. 107 Fifth avenue, and had its office and editorial rooms there. Its superintendent and chief editor was the defendant Spies. The defendant Schwab, was co-editor, and wrote some of the most important of the editorials. The defendant Fischer was a type-setter in the office, and about the 1st of May, 1886, was the head foreman of the printing department. This paper was owned by a corporation in which Spies, Schwab, Fischer and Neebe were stockholders. It was printed in the German language, and, besides its daily issue, had a Sunday edition called the "Fackel," and a weekly edition called the "Vorbote." Its circulation was about thirty-six hundred. Notices of the meetings of workingmen were inserted in its columns without charge.

Another newspaper by the name of the "Alarm," owned by the International Arbeiter Association, and conducted in the English language in the interest of the English-speaking groups, was also published at the same building, No. 107 Fifth avenue. Its editor and manager from October, 1884, to May, 1886, was the defendant Parsons. The defendant Fielden owned some of the stock in the corporation which controlled it. Its circulation was about two thousand. It was first issued as a weekly, and afterwards as a semi-monthly paper. Still another newspaper, called the "Anarchist," was started in January or February, 1886, by the Northwest side group and two of the South side groups. It was under the management of the defendant

Engel. Its origin was announced as being due to the fact that the Arbeiter Zeitung was not outspoken enough in its anarchistic principles. Its efforts were directed to the same ends as those contemplated by the other papers mentioned.

All the bills for the printing of the Arbeiter Zeitung and the Alarm were made out to the Arbeiter Zeitung and were paid by the defendant Spies, occasionally by check, but generally in currency.

There was a bureau of information of the Internationals. This also had its headquarters at the Arbeiter Zeitung building. The bureau of information designated to act for the years 1885 and 1886 consisted of the defendants Spies and Parsons, the librarian Hirschberger, one Belthazer Rau, an advertising agent of the Arbeiter Zeitung, and one Joseph Bach, a member of the North side group and afterwards a director of the Arbeiter Zeitung. Letters were always addressed to Spies, as a member of the bureau, at 107 Fifth avenue.

Besides the regular weekly meetings of the groups heretofore mentioned in their respective halls, there was occasionally a meeting of all the "armed sections" of the different groups at No. 54 West Lake street, known as Greif's Hall.

These meetings of the armed sections whose members were located in the north, south and west divisions of the city were irregular. They were called by a signal given by the Arbeiter Zeitung. This signal was: "Y-Komme Montag Abende," or "Y-come Monday night." Whenever these words appeared in the letter-box column of the Arbeiter Zeitung they were understood to be a summons to the "armed sections" to meet on Monday night at Greif's Hall.

The evidence in the record shows that there were in the city of Chicago twenty-five or thirty labor unions, containing from fifteen thousand to sixteen thousand laborers, and that delegates from these unions constituted a body called the Central Labor Union. The large majority of those who belonged to the labor unions were well-meaning workmen, whose designs were not unlawful, and the object of whose organization was to better their own condition. They did not all belong to the groups of the International Association. But the members of those groups were, as a general thing, also members of the different labor unions.

It thus appears that the branch of the International Workingmen's Association which existed in Chicago during the year 1885, and up to May 4, 1886, was a compact, well-disciplined organization. At the head of it was a general or central committee. Next to the committee came the Lehr und Wehr Verein, a secret military organization divided into companies. Next to the Lehr und Wehr Verein came the "armed sections" of the various groups, practicing their weekly drills at night and on Sunday in various parts of the city, and, in some instances, under the direction of the officers of the Lehr und Wehr Verein. Next came the unarmed men of the groups, who were constantly in contact with their armed brethren and in hearty sympathy with their purposes and principles. As to some of the groups, however, all the members seem to have been engaged in arming and drilling.

There can be no doubt that the organization here described was an unlawful conspiracy.

First. Its *purpose* was unlawful. It designed to bring about a social revolution. Social revolution meant the destruction of the right of private ownership of property, or of the right of the individual to own property; it meant the bringing about of a state of society in which all property should be held in common. As a court, we are not concerned with the question whether it was right or wrong to adopt and advocate an abstract theory in regard to the ownership of property, such as is here indicated. But this abstract theory assumed a concrete and practical form. The police and militia were looked upon as protectors and guardians of the form of ownership in property which was objected to. Hence, "social revolution" meant war upon the police and militia. The destruction by force of the police and militia in the city of Chicago was the practical object which this organization proposed to accomplish in that city.

Second. Its *methods* were unlawful. The arming and drilling of the groups was in violation of the militia law of the state of Illinois, which provides that "it shall be unlawful for any body of men whatever, other than the regular organized volunteer militia of this state and the troops of the United States, to associate themselves together as a military company or organization, to drill or parade with arms in any city

or town of this state without the license of the governor thereof," etc. It is not pretended that any such license was ever issued to these groups by the governor of the state.

The central or governing authority of this International organization had its headquarters in the Arbeiter Zeitung building and in a room connected with the office of the Arbeiter Zeitung newspaper. From that place mainly its policy was dictated and the orders which controlled its movements were issued. Among the principal persons who shaped its policy and outlined its course of action were the defendants Spies, Schwab, Engel, Lingg, Fielden, Parsons, Fischer, and in a subordinate degree Neebe.

These defendants sought to use the organization for the purpose of bringing about the "social revolution," and, to that end, endeavored to increase its membership and perfect its discipline so as to hurl it against the police and militia, as the representatives of law and order. Among the means employed to accomplish this were, "*agitation* with a view to organization," and "organization for the purpose of rebellion." The object of "*agitation*" was to increase the ranks of the "armed sections" of the International groups by recruits from the "Labor Unions" and other associations of workingmen. The meaning of "organization" was the arming of such recruits with dynamite and revolvers.

During the years 1885 and 1886 the defendants Spies, Schwab, Parsons, Engel and Fielden by numerous speeches, and by articles published in the newspaper organs above mentioned, persistently advised and encouraged the workingmen to arm themselves for a conflict with what were called the property-owning classes and with the police and militia, who were regarded as the special protectors of those classes. These speeches were made at picnics, in workingmen's halls, at gatherings of the International Groups, in Market square, and from the windows of the Arbeiter Zeitung building. They denounced the police and militia. They inveighed against the "private right of property." They advised the purchase of rifles and dynamite.

Extracts from the Alarm, the Arbeiter Zeitung and the Anarchist, and from speeches of Schwab, Spies, Parsons, Fiel-

den and Engel, are set out in the statement which precedes this opinion.¹

The articles in the Alarm were most of them written by the defendant Parsons, but some of them by the defendant Spies. The articles quoted from the Arbeiter Zeitung were written by the defendants Schwab and Spies. The single extract from the Anarchist was written by the defendant Engel.

The articles and speeches so collated are of the most violent and incendiary character. They seek to inspire a feeling of hatred among the workingmen against the police and militia and the property-owning classes. They not only recommend the workingmen to arm themselves with dynamite and rifles, but they give specific instructions how to handle and use dynamite and how to make bombs and how to procure weapons. They recommend the workingmen to attend the meetings of the International Arbeiter Association and read its organs. They advise the formation of special groups for committing deeds of violence, which are called "revolutionary actions," and point out the means of avoiding discovery after such deeds are committed. In the Arbeiter Zeitung articles will be found such expressions as these: "Each workingman ought to have been armed long ago;" "Daggers and revolvers are easily to be gotten, hand grenades are cheap to be produced; explosives, too, can be obtained;" "The workingmen ought to take aim at every member of the militia;" "Your passport to it, Eden, is that banner which calls to you in flaming letters the word 'Anarchy;'" "Therefore, workingmen, do arm yourselves with the most effective means;" "There is no other way than to become immediately soldiers of the revolutionary army and establish conspiring groups, and let the ruins fall on the homes of such;" "We wonder whether the workingmen . . . will at last supply themselves with weapons, dynamite and prussic acid;" "Workingmen, arm yourselves;" "Enough is said about the importance of being armed. . . . We are to go to work to supply ourselves as quickly as possible with these useful things. . . . Dynamite bears several names here in America; among others it is known in trade also under

¹Statement omitted, as the facts are so fully and concisely set forth in the opinion. See Vol. 5, Am. Cr. R., 637.

the names of Hercules powder and giant powder;" "There marched a strong company of well-armed comrades of the various groups; . . . the nitro-glycerine pills were not missing;" "There exists to-day an invisible network of fighting groups;" "Every trades-union should make it obligatory to every member to keep a good gun at home and ammunition;" "If we do not prepare ourselves for a bloody revolution, we cannot leave anything to our children but poverty and slavery. Therefore prepare yourselves in all quietness for the revolution."

The following expressions will be found in the extracts from the Alarm:

"One man armed with a dynamite bomb is equal to one regiment of militia," etc.; "Every man who is master of these explosives cannot be approached by an army of men;" "How can all this be done? Simply by making ourselves masters of the use of dynamite; then . . . administer instant death, by any and all means, to any and every person who attempts to continue to claim personal ownership in anything. . . . Our war is not against men, but against systems; yet we must prepare to kill men who will try to defeat our cause. . . . The rich are only worse than the poor because they have more power to wield this infernal property right;" "Dynamite is the emancipator; in the hands of the enslaved it cries aloud, 'Justice or annihilation.' But, best of all, the workingmen are not only learning its use, they will use it, and effectually, until personal ownership, property rights are destroyed, etc. . . . Hail to the revolution! Hail to the deliverer Dynamite;" "Nothing but an uprising of the people and a bursting open of all stores and storehouses to the free access of the public, and a free application of dynamite to every one who opposes, will relieve the world of this infernal nightmare of property and wages;" "Seeing the amount of needless suffering all about us, we say a vigorous use of dynamite is both humane and economical. . . . It is upon this theory that we advocate the use of dynamite. It is clearly more humane to blow ten men into eternity than to make ten men starve to death;" "Dynamite: of all the good stuff, this is the stuff. Stuff several pounds of this sublime stuff into an inch pipe, gas or water pipe, plug up both ends, insert a cap with a fuse attached, place this in the immediate neighborhood of

a lot of rich loafers, who live by the sweat of other people's brows, and light the fuse. A most cheerful and gratifying result will follow;" "The next issue of the Alarm will begin the publication of a series of articles concerning revolutionary warfare, viz.: 'The Manufacture of Dynamite Made Easy,' 'Manufacturing Bombs,' 'How to Use Dynamite Properly,' etc." "All governments are domineering powers, etc. . . . Assassination will remove the evil from the face of the earth. . . . Assassination properly applied is wise, just, humane and brave. For freedom all things are just;" "Though everybody nowadays speaks of dynamite, . . . few have any knowledge of the general character and nature of this explosive. For those who will sooner or later be forced to employ its destructive qualities in defense of their rights as men, and from a sense of preservation, a few hints may not be out of place. Dynamite may be handled with perfect safety if proper care is used," etc. (Then follow a series of minute directions.)

During the months of December, 1885, January, February and March, 1886, the following notice appeared in the Arbeiter Zeitung:

"'Exercise in Arms.' Workingmen who are willing to exercise in the handling of arms should call every Sunday forenoon, at half past 9, at No. 58 Clybourne avenue, where they will receive instructions gratuitously."

In the Alarm, from August 17, 1885, to April 24, 1886, appeared the following notice:

"The armed section of the American group meets Monday night, at No. 54 West Lake street."

One Herr Most had prepared a treatise or book, entitled "Revolutionary Warfare," containing instructions that entered into the minutest details as to the best mode of preparing dynamite and other explosives, and of making bombs and other weapons. From time to time in 1885 and 1886 the Alarm and the Arbeiter Zeitung published translations and extracts from this book, for the evident purpose of communicating the information in it to the members of the groups and to their other readers among the workingmen. Specimen extracts from this treatise are set out in the "Statement" which prefaces this opinion.

In the extract from the "Anarchist" will be found the following expressions: "All government we hate. . . . Complaints should be sent to G. Engel. . . . Workingmen and fellows: . . . he who would war successfully must equip himself with all implements adapted to destroy his opponents. . . . We strive towards the overthrow of the existing order," etc.

The defendant Schwab, in a speech delivered on April 26, 1886, about a week before the Hay-market meeting, said: "Everywhere police and murderers are employed to grind down workingmen. For every workingman who has died through the pistol of a deputy sheriff, let ten of those executioners fall. Arm yourselves."

The defendant Spies, in a speech made in October, 1885, said that "there were nine millions of people engaged in industrial trades in this country; there were but one million of them as yet organized, while there were two millions of them unemployed; to make a movement in which they were engaged a successful one it must be a revolutionary one; don't let us . . . forget the most forcible argument of all — the gun and dynamite."

In speeches made by him the defendant Parsons said, in February, 1885: "We need no president, no congressmen, no police, no militia and no judges; they are all leeches sucking the blood of the poor, who have to support them by their labor; I say to you, rise one and all, and let us exterminate them all. Woe to the police or the militia whom they send against us." In April, 1885, he said: "The only way to convince these capitalists and robbers is to use the gun and dynamite." Again he said, in April, 1885: "If we would achieve our liberation from economic bondage and acquire our natural right to life and liberty, every man must lay by a part of his wages, buy a Colt's navy revolver, a Winchester rifle, and learn how to make and to use dynamite. Then raise the flag of rebellion, the scarlet banner of liberty, fraternity, equality, and strike down to the earth every tyrant that lives upon this globe. Tyrants have no rights which we should respect. Until this is done, you will continue to be robbed, to be plundered, to be at the mercy of the privileged few; therefore *agitate for the purpose of organization, organize for the purpose of rebellion, for*

wage-slaves have nothing to lose but their chains." And in August, 1885, referring to the street-car strike, he said: "If but one shot had been fired and Bonfield had happened to be shot, the whole city would have been deluged in blood and the social revolution would have been inaugurated."

The defendant Fielden, in speeches made by him, said in March, 1885: "I want all to organize; every workingman in Chicago ought to belong to our organization; it is of no use to go and beg of our masters to give us more wages or better times. When I say 'organize' I mean for you to use force; it is of no use for the working people to hope to gain anything by means of the ordinary weapons; every one of you must learn the use of dynamite, for that is the power with which we hope to gain our rights." In October, 1885, he said: "You must all organize and use force; you must crush out the present government, as by force is the only way in which you can better your present condition." He said in January, 1886: "It is quite true that we have lots of explosives and dynamite in our possession, and we will not hesitate to use it when the proper time comes. We care nothing either for the military or police, for these are in the pay of the capitalist." Again in March, 1886, he said: "We are told that we must attain our ends and aims by obeying law and order. Damn law and order. We have obeyed law and order long enough. The time has come for you men to strangle the law, or the law will strangle you."

The defendant Engel made a speech in German in February, 1886, to a crowded hall of workingmen, of which one witness says: "He advised everybody — 'every man wants to join them, to save up three or four dollars to buy revolvers to shoot every policeman down;' he says he wants every workingman whom he could get to join them, and then advises everybody you know — you save up three or four dollars to buy a revolver that was good enough for shooting policemen down;" and again in the same month he made a speech to the North side workmen at Neff's Hall, 58 Clybourne avenue, where the North side group met, as already stated, in which he said "that those who could not arm themselves and could not buy revolvers, should buy dynamite; that it was very cheap and easily handled; he gave a general description how bombs could be

made, how gas-pipes could be filled; that a gas-pipe was to be taken and a wooden block put into the end, and it was to be filled with dynamite; then the other end is also closed up with a wooden block, and old nails are tied around the pipe by means of wire; then a hole is bored into one end of it and a fuse with a cap is put into that hole; that the nails should be tightened to the pipe, so that when it explodes there will be many pieces flying around; that gas-pipe could be found on the West side along the river, near the bridge.

The utterances by printed and spoken words, of which the quotations above made are specimens, were addressed to workmen, of whom the defendant Spies says that they were "stupid and ignorant." While the members of the International groups were reading and hearing the appeals thus made to their prejudices, they were discussing their condition in weekly meetings, and very many of them participating in weekly drills with arms.

The time when the war against the police was to be inaugurated was not an indefinite period in the future. The evidence shows that the date fixed for the inauguration of the social revolution was the 1st of May, 1886.

Two years before May 1, 1886, the working people had "resolved that the eight-hour system should be introduced in the United States at that date." The defendants in this case and the more radical members of the International groups had no faith in the eight-hour movement. This abundantly appears from the testimony in the record. Gruenhut swears that Spies did not consider the movement as amounting to anything; that he regarded it as "only a palliative measure, not radical enough." A want of confidence in it on the part of the defendant Spies is apparent from the language of some resolutions introduced by him on October 11, 1885, at a meeting at the Twelfth street Turner Hall, one of which began in this wise:

"Resolved, that, while we are skeptical in regard to the benefits that will accrue to the wage-workers in the introduction of an eight-hour work day," etc. At a speech made at the same meeting Fielden said: "The eight-hour law will be of no benefit to the workingman." An article in the Alarm, dated April 3, 1886, in which the defendant Parsons gives an account of a speech made by him to the American groups, shows that

he only valued "the attempt to inaugurate the eight-hour system," because he thought it "would break down the capitalistic system and bring about such disorder and hardship that the 'social revolution' would become a necessity."

Engel said in the Anarchist: "We reject reformatory measure as useless play. . . . All endeavors of the working classes not aiming at the overthrow of existing conditions of ownership . . . are to us reactionary," etc.

The 1st of May was fixed upon as the date for the inauguration of the "social revolution" because of the strikes and disturbances which were expected to grow out of the demand for the eight-hour working day. It was anticipated that many workmen would be out of employment and that their discontent and sufferings would drive them into an adoption of the revolutionary plans of the International groups.

The witness Johnson says that, at the meetings of the armed section of the American group, "the 1st day of May was frequently mentioned as a good opportunity" for the revolution.

In a speech in December, 1885, at Twelfth street Turner Hall, Fielden said:

"The 1st of May will be our time to strike the blow; there are so many strikes and there will be fifty thousand men out of work."

Spies said that the conflict between the police and the "dynamiters" would probably occur when there should be a universal strike for the eight-hour law.

The International groups and other associations of workmen were frequently urged to prepare to demand the eight-hour law on the 1st of May, 1886, with arms in their hands. They were told that such demand would be the more readily acceded to if made by armed men.

In an article published in the Arbeiter Zeitung, on the afternoon of Tuesday, May 4, 1886, only a few hours before the Hay-market meeting occurred, the defendant Spies said: "Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourselves. If you do not do this you will be sent home with bloody heads, and birds will sing May songs on your graves.'"

Looking into some of the statements made by the journals and speakers referred to, we find the following:

The Arbeiter Zeitung said on January 22, 1886: "With empty hands the workingmen will hardly be able to cope with the representatives of the club, in case, after the 1st of May of this year, there should be a general strike; . . . but if the workingmen are prepared to eventually stop the working of the factories, to defend himself with the aid of dynamite and bombs against the militia, which will of course be employed, then and only then can you expect a thorough success of the eight-hour movement." It said on January 23, 1886: "Therefore, comrades, armed to the teeth, we want to demand our rights on the 1st of May; in the other case there are only blows of the club for you." It said on March 2, 1886: "Who wants to attack capital in earnest must overthrow the bodyguards of it, the well-drilled and well-armed 'men of order,' and kill them, if he does not want to be murdered himself. But for this is needed an armed and systematically drilled organization;" and on the same page are these words: "The time up to the 1st of May is short. Look out."

The Alarm said on September 5, 1885: "Now in regard to the proposed strike *next spring*, a few practical words to our comrades. . . . Will the manufacturing kings grant the modest request? . . . No, sir, . . . they will then draw from the army of unemployed; the strikers will attempt to stop them. Then comes the police and the militia. . . . Say, workingmen, are you prepared to meet the latter; are you armed?"

The defendant Spies, on October 11, 1885, at the meeting at Twelfth street Turner Hall, already referred to, introduced, in a speech made by him, the following resolution:

"Whereas, A general move has been started among the organized wage-workers of this country for the establishment of an eight-hour work day, to begin May 1, 1886. And

"Whereas, It is to be expected that the class of professional idlers, the governing class, who prey upon the bones and marrow of the useful members of society, will resist this attempt by calling to their assistance the Pinkertons, the police and the state militia,

"Resolved, That we urge upon all wage-workers the neces-

sity of procuring arms before the inauguration of the proposed eight-hour strike, in order to be in a position of meeting our foe with his own argument — force."

A little over two months after this resolution was introduced, to wit, on December 29, 1885, the North side group, to which Schwab, Lingg and Neebe belonged, held a meeting at No. 58 Clybourne avenue and adopted the following resolution: "This assembly declares that the North side group, I. A. A., pledges itself to work with all means for the introduction of the eight-hour day, beginning on the 1st of May, 1886. At the same time the North side group cautions the *workingmen* not to meet the enemy unarmed on the 1st of May," etc.

Besides the publication of extracts from Herr Most's book in the Alarm and Arbeiter Zeitung, the book itself was extensively circulated among the groups and other workingmen. The Arbeiter Zeitung inserted, without charge, on March 2, 13, 18 and 25, 1886, the following notice: "'Revolutionary Warfare' has arrived and is to be had through the librarian at 107 Fifth Avenue, at the price of ten cents." Hirschberger, the librarian here referred to, sold this book at picnics where the defendants Fielden, Parsons, Spies, Schwab, Fischer and Neebe were present. It was distributed at meetings of workingmen. It was seen at such meetings in the Twelfth street Turner Hall, at Greif's Hall and at 106 Randolph street, at all of which places Fielden and Parsons made speeches, and where the American group, to which they belonged, held meetings. The "books were sold there. The chairman had charge of the books."

One of the witnesses says he saw copies of Herr Most's book at meetings of the North side group and that "the North side group bought and sold them."

The efforts of the defendants to prepare for the disturbances expected to grow out of the eight-hour movement on or about May 1, 1886, were not confined to speeches or newspaper articles. Nor was the circulation of Herr Most's book on Revolutionary Warfare the only step taken towards the instruction of the groups in the mode of preparing and using dynamite. The record discloses the adoption by the defendants of other and more practical measures in the work of preparation.

In the fall of 1885 the defendant Engel called on a gunsmith

and inquired what a hundred or possibly two hundred large revolvers could be purchased for, stating that they were wanted for some society. He bought and paid for one of the pistols for the purpose of presenting it at a meeting of the society. After the Hay-market meeting a machine, which was intended to be used for the purpose of making bombs, was found by the police at Engel's house. The proof shows that in the late spring or early summer of 1885, a part of this machine was made by a tinner on Milwaukee avenue in pursuance of an order therefor given by Engel in person.

A witness engaged in the gun business swears that in February or March, 1886, the defendant Parsons called at his store and stated that he wanted to buy forty or fifty revolvers. Upon being shown the samples on hand, he declared that they were not what he desired, but that he wanted "old remodeled Remington revolvers." The witness wrote for quotations as to the prices and gave them to Parsons upon his calling afterwards. He came once or twice but did not finally make the purchase.

The testimony shows that in the summer of 1885 the defendants Fielden and Parsons participated in the drilling exercises, at No. 54 West Lake street, of the armed section of the American group, to which they both belonged, and of which Fielden was the secretary and treasurer. A drill occurred at that place August 24, 1885. Fielden and Parsons were present and took part. Suspected persons were ejected, the doors were closed, and the company was drilled for a half or three-quarters of an hour by a German drill-master, going through the regular manual of drill, marching, counter-marching, turning, forming fours, wheeling, etc. It was on that occasion that the ten members of the first company of the Lehr und Wehr Verein, armed with Springfield rifles, were introduced, and drilled before the members of the "armed section" of the American group. On that occasion, also, the "armed section" adopted the name of the "International Rifles," of which one Walters was elected captain, and the defendant Parsons lieutenant. The International Rifles there agreed, as heretofore stated, to act in concert with the Lehr und Wehr Verein and obey the orders of its officers in the event of a conflict with the authorities. At that meeting the drill-masters exhibited two specimens of the latest improved dynamite bombs for the

examination of those present. They were about the size and had the appearance of ordinary fruit cans. The top part unscrewed, and the inside of the cans was filled with a light-brown mixture. There was also a small glass tube inserted in the center of the can. The tube was in connection with the screw, and it was explained that when the can was thrown against any hard substance it would explode.

At a subsequent meeting at the same place on August 31, 1885, the defendants Fielden and Parsons were present and participated in another drill under Walters, which lasted an hour and a half. A consultation was had as to the best means of procuring arms. It was proposed that each member should pay so much a week, until enough should be raised to buy a rifle for each. The defendant Parsons proposed that a raid be made at night upon the armory of the militia.

It furthermore appears from the evidence that the defendants Spies, Schwab, Fielden, Parsons and Fischer were engaged in handling bombs and experimenting with dynamite. Samples of bombs were kept at the rooms of the Arbeiter Zeitung. Improved kinds of bombs were several times left there for the inspection of the defendant Spies. At one time two bombs, whose shells were of iron, and which were so made as to be exploded by percussion, were left with the defendant Spies at his office in the building No. 107 Fifth avenue. At another time two bombs, known as the Czar bombs, were brought to Spies at the same office and left there with him.

The defendant Spies admits in his testimony that he purchased bars of dynamite and caps and fuse for the purpose of experimenting with them. On the morning after the Hay-market meeting there were found at the office aforesaid a coil of fuse, two bars of dynamite and a box containing fulminating caps for the explosion of dynamite.

Three witnesses swear that they were at the office of the Arbeiter Zeitung in April, 1885, on the evening of what is known as the board of trade demonstration, and after the demonstration had ended; that Spies, Parsons, Fielden and Schwab were present; that a dynamite cartridge, a coil of fuse and a fulminating cap were taken by Spies from a drawer in the desk and handed to Parsons, by whom they were exhibited to the witnesses. On that occasion Parsons said that they were pre-

paring for a warfare against the police and militia with bombs and dynamite and rifles and revolvers; and Fielden, who was standing at the elbow of Parsons, said that "the next time the police attempted to interfere with them they would be prepared for them," "and perhaps in the course of a year or so."

In August, 1885, Seliger was present at the office of the Arbeiter Zeitung, at a meeting of the general or central committee of the International Association. He was there as a delegate from the North side group. The committee met in the evening in the library room belonging to the International Workingmen's Association. The defendant Spies was present. Seliger saw there two bombs, one round one and one long one. They were below the counter. Rau, the advertising agent of the Arbeiter Zeitung, was exhibiting them while the delegates were present.

On Thanksgiving day in November, 1885, there was a meeting of workingmen on Market square. On that day at Thalia Hall the defendant Fischer gave to Godfried Waller, a member of the Lehr und Wehr Verein, a gas-pipe bomb, seven or eight inches long, saying that it was to be used on Market square in case of an attack by the police. Waller kept the bomb in his house two weeks and then gave it to a member of the Lehr und Wehr Verein, who exploded it in the woods in a hollow tree.

Spies and other members of the organization to which he belonged were in the habit of going out into the country in the summer and practicing with bombs. Their practice was directed to the twofold object of learning how to throw the bombs and also of learning how to explode them. An instance is referred to in the evidence, where one of them was exploded in a grove and demolished some of the trees.

One of the witnesses testifies that, in January, 1886, at the Arbeiter Zeitung office, he had an interview with the defendant Spies, at which one of the Czar bombs, heretofore referred to, was produced and shown by Spies, and afterwards carried away by the witness. On that occasion Spies stated that bombs were sometimes distributed through the Arbeiter Zeitung office, and that the one then shown was one of the samples they kept there. He also then stated that a fuse bomb with a detonating cap inside, such as was the Czar bomb, had been proven to be the best kind, and that shells made of *compound*

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metal were much better than shells made of all lead or all metal. He spoke of a body of tall, strong men in their organization who could throw bombs, weighing five pounds, one hundred and fifty paces.

He stated that the bombs in question were to be used in case of conflict with the police or militia.

Coming back to the defendant Lingg, we think it quite apparent from the testimony that his efforts in the matter of constructing bombs, as heretofore narrated, were made under the auspices of the International Association, and in furtherance of its objects and purposes. What he did was merely a part of that general preparation which the other defendants and the groups already described were making for the conflict expected to take place in the early part of May, 1886.

That this is so will appear from several considerations.

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First. In March, 1886, the Carpenters' Union had a ball at Florus Hall, No. 73 West Lake street. A profit was made on the beer sold at this ball, and it was there suggested that the money representing that profit should be used to buy targets, lead, etc., for some shooting practices that were expected to take place. The money was, however, turned over to the "armed section" of the Carpenters' Union, that is to say, to those members of the Carpenters' Union who belonged to the armed sections of the different International groups. Several of these members came together at a subsequent meeting and resolved to buy dynamite and practice with that, instead of shooting at targets. The last-named meeting also took place at Florus Hall, and Lingg and Lehmann, who both belonged to the "armed section" of the North side group, were present. Lehmann says: "It was unanimously resolved that we were to buy dynamite with it, and experiment with it to find out how it was used; how it was handled. We were unanimous that some one should take the thing in hand, and Lingg was intrusted with it, and he took the money and bought dynamite with it."

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It was just about this time, to wit, the middle of March, 1886, when Lingg first brought a bomb of dynamite to Seliger's house and began to melt and cast and make shells, as heretofore set forth.

It thus appears that about two months or six weeks before

the Hay-market meeting the defendant Lingg was selected by certain members of the armed sections of the International groups as their agent to buy dynamite with their money, and experiment with it and learn how to use and handle it.

The reason why Lingg was selected for this work is quite manifest. Although he was only twenty-one or twenty-two years old at the time of the trial, and prior thereto had lived in this country only about nine or ten months, he seems to have taken an active interest in the movements of the International Association. He had been a socialist in Europe "ever since he could think." As already stated, he belonged to the armed section of the North side group. He was not only a member of the Carpenters' Union, but its financial secretary. He was seen at meetings on the Lake front, where some of the defendants already named were making speeches. He was present at meetings of the Central Labor Union. He made a speech on April 4, 1886, at 650 Blue Island avenue, at the second meeting of the Lumber Shovers' Union. He was seen at almost every meeting of the Carpenters' Union at Zepf's Hall from September, 1885, to May, 1886. At a meeting of that union at Zepf's Hall on the night of May 3, 1886, he is said to have made a lengthy report as to the organization of the carpenters at the different shops, and to have had the floor two or three times in the discussion of the eight-hour movement. On the morning of May 3d young men came to his room at Seliger's house and had their names entered upon the list of the union. He was well known to Bach and Spies; the former had known him five or six months. He carried reports of anarchist meetings to the Arbeiter Zeitung, and had gone to that paper for that purpose at least five times. He was present on the afternoon of May 3, 1886, at the attack hereafter mentioned of a mob of strikers upon a manufacturing establishment in the southwestern part of the city, and must have heard the address of Spies on that occasion. He claimed, after his arrest, to have been clubbed by the police at that disturbance.

Second. Thielen, Lehmann, Seliger, Hermann or Heumann, and Huebner, who were with Lingg on Tuesday afternoon while he was filling the bombs, and some of whom were assisting him in his work, were all prominent members of the "armed

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n or Heumann, afternoon while were assisting of the "armed

sections" of the International groups. Huebner was the librarian of the North side group, and had charge of the distribution of Herr Most's book. Seliger, with whom Lingg had boarded for months, and who was his main assistant in making the bombs, was a member of the general committee which stood at the head of all the groups, and, as has already been stated, had been present with Spies at a session of that committee when Rau was exhibiting to its members samples of round and long bombs, such as Lingg himself afterwards made.

Third. One of the Czar bombs which was in the possession of Spies in January, 1886, was produced upon the trial of this cause in the court below. It is similar in all respects to the bombs made by Lingg, and to the bomb which exploded at the Hay-market. We find photographic views of it in the record. It consists of two semi-globular shells fastened together by a metallic bolt, with a head at one end and a nut at the other.

It has a fuse and detonating cap, the latter pinched to hold the fuse, just as appears in the photographic representations to be found in the record of the bombs made by Lingg.

The nut taken from the body of Hahn corresponded as exactly with the nut upon the Czar bomb as with the nuts upon the Lingg bombs.

A chemical analysis was made of the material of the shell of the bomb, and such material was found to be the same composite manufacture as that which characterized the Lingg bombs and the Hay-market bombs. "The Spies bomb" or Czar bomb "was found like the others to consist also chiefly of lead with a small quantity of tin, and traces of the same antimony, iron and zinc." This circumstance, taken in connection with the declaration of Spies that members of the International groups had, by practice and experiment, demonstrated the superiority of compound metal in the construction of bomb shells, points very strongly to the conclusion that the Czar bomb, retained by Spies in his possession in January, 1886, was used by Lingg as a sample, and was the same bomb which Seliger saw at his house in Lingg's hands more than six weeks before May 4, 1886.

Fourth. Another circumstance is worthy of mention in this connection. In a communication upon the subject of making bombs, published by Spies in the Alarm on June 27, 1885, he

says: "When filling bombs . . . tie a handkerchief over mouth and nose, so that you may not inhale the dangerous gases. . . . In filling bombs use a little wooden stick," etc.

It has already been stated that when Lingg and Huebner were filling bombs on the afternoon of Tuesday, May 4, 1886, each of them had a cloth tied around his face, and Seliger and Lingg used a flat piece of wood, made by Lingg for the purpose of putting dynamite into the shells. Thus the instructions given by Spies in the Alarm were literally complied with by the bomb-makers on May 4, 1886.

We think the jury were warranted in believing from the evidence that the bomb which exploded at the Hay-market was made by the defendant Lingg in furtherance of the conspiracy already described.

The question which next suggests itself is whether the bomb so made was thrown at the Hay-market by a member of said conspiracy, or by some one acting under its direction and in pursuance of its designs.

In order to solve this question, it will be necessary to make a preliminary investigation as to the disposition which Lingg and his assistants made of the bombs constructed by them, after they were prepared for use,

The bombs made and filled on Tuesday afternoon and evening were carried by Lingg and Seliger on that evening from Seliger's house over to No. 58 Clybourne avenue, known as Neff's Hall. The trunk or satchel in which they had been placed was carried a part of the way by Lingg and Seliger by means of a stick drawn through the handle. They were met on the way, however, by Muenzenberger, who has been heretofore spoken of, and he seems to have then taken the trunk and carried it the rest of the way on his shoulder. It was about ten minutes' walk from 442 Sedgwick street to Neff's Hall. Neff says that they reached his saloon at ten or fifteen minutes after 8, but Seliger states that they started from his house with the bombs at half past 8.

At No. 58 Clybourne avenue the front room on the first floor is a saloon. Back of the saloon is a hall or assembly room. Between the saloon and hall is a passage-way, which can be entered by doors leading from the saloon and hall, and also by a door opening upon a walk that leads along the side of the

building into the street. On this evening a meeting of painters was in session in the hall. Lingg, Seliger and Muenzenberger first went into the saloon, and Lingg inquired of Neff if any one had been there and asked for him, to which he received a negative reply. Lingg and Seliger, accompanied by Muenzenberger, with the satchel or trunk, then went from the saloon into the passage-way referred to. The trunk was placed upon the floor in the passage-way or hall-way and opened. Seliger says: "Several persons came and took bombs. There were different ones there who took bombs out for themselves." He saw three or four take them. He himself took two and carried them in his pocket until after the explosion that night, when he buried them under the sidewalk on Sigel street, where they were afterwards found, as shown by the testimony of several witnesses.

Lingg and Seliger then went out of the building, No. 58 Clybourne avenue, leaving the open satchel with the bombs in it in the passage-way, where it had been deposited.

Muenzenberger also disappeared. The latter seemed to be a stranger; Neff, the keeper of the saloon, never saw him until he brought the satchel there that night; Lehmann did not know him, as has already been stated; although he was at Seliger's house that afternoon from 4 to 6 o'clock working at bombs, Seliger did not know his name and did not learn it until some time afterwards. This circumstance naturally calls to mind the instructions in regard to revolutionary actions, published in the Arbeiter Zeitung on March 16, 1885, and set forth in the "statement" hereto prefixed, one sentence of which is as follows: "In the commission of a deed, a comrade who does not live at the place of action, that is, a comrade of some other place, ought, if possibility admits, to participate in the action, or, formulated differently, a revolutionary deed ought to be enacted where one is not known."

In this narration in regard to the disposition of the bombs two facts are noticeable. *First.* They were carried to and left at No. 58 Clybourne avenue. Why? Neff's Hall was known as the "Shanty of the Communists." There the communists and anarchists and all the various shades of the socialistic organizations were in the habit of meeting. Some statements already made in regard to this place may be here briefly re-

capitulated. It was the place where the members of the North side group met every Monday evening and advised together and reviewed what had happened among the workingmen during the week, and drilled with hunting-guns and shot-guns, and some of them, on Sundays, with rifles. It was the place where the Arbeiter Zeitung requested workingmen willing to exercise in the handling of arms to call every Sunday for the purpose of receiving instructions gratuitously. It was the place where the North side group had adopted a resolution cautioning the workingmen "not to meet the enemy unarmed on May 1st," etc. The manner in which the bombs were left in this particular place and there exposed to view, considered in connection with all the other circumstances heretofore and hereafter mentioned, points strongly to the conclusion that they were intended for the use, on that evening, of the members of the conspiracy, whose principles and purposes have already been outlined.

Second. The fact that as soon as the trunk was opened and deposited in the hall-way men came forward and took bombs therefrom indicates an expectation that bombs would be found at that place at that time. The prompt appearance of these men at No. 58 Clybourne avenue as soon as Lingg arrived there, and their immediate appropriation of the bombs placed before them, are circumstances which tend to establish the existence of some more specific plan for the use of the bombs than that which has heretofore been pointed out. To ascertain what this specific plan was will require an examination of the events immediately preceding the explosion of the bomb at the Hay-market.

Up to the last days of April, 1886, the conspiracy in which the defendants were engaged was general in its character. Its object was the destruction of the police and militia of Chicago. The forces to be used in the accomplishment of this object were the International groups and such of the workingmen as could be induced to join those groups. The time when the conflict between the workingmen and the police was to be precipitated was about the 1st of May and in the midst of the excitement which should prevail during the efforts of the laborers to shorten their hours of work.

The preparation for the expected conflict became more defi-

nite as the eight-hour movement approached its culmination. Inside of the general conspiracy already described, and growing naturally out of it, a more detailed plan for securing the ends sought to be attained was originated, adopted and partially executed.

Early in the evening of May 3, 1886, the commander of the Lehr und Wehr Verein rented the basement of the building known as No. 54 West Lake street, and also called Greif's Hall, for the purpose of holding there on that evening a meeting of the "armed sections" of the International groups.

The meeting was held in pursuance of the arrangement so made. It was secret. A guard was placed in front of the building, and another was also stationed in the rear, to prevent any entrance into the basement by outsiders.

Some seventy or eighty members of the "armed sections" from the North, South and West divisions of the city were present. The session lasted from 8 o'clock to 11 o'clock. The members present at this gathering discussed and adopted the plan hereinafter set forth.

On the day before, that is to say, on the morning of Sunday, May 2, 1886, at 10 o'clock, the members of the second company of the Lehr und Wehr Verein and of the Northwest side group had met at Bohemian Hall on Emma street in the northwest part of the city. On that occasion the defendants Engel and Fischer were both present. Engel had there submitted to this Emma street meeting "*a plan of his own conception, according to which, whenever it would come to a conflict between the police and the Northwestern groups, that bombs should be thrown into the police stations, and the riflemen of the Lehr und Wehr Verein should post themselves in line in a certain distance, and whoever would come out should be shot down — all those that would come out of the station or stations, he said; then it should proceed in that way until we would come to the heart of the city. Within the heart of the city, of course, the fight should commence in earnest.*" It was also arranged that the members of the Northwest side groups should "mutually assist themselves to make an attack upon the police," and "if any one had anything with him he should use it."

This plan of Engel had been submitted by him to the Emma

street gathering in the form of a resolution and had been adopted.

On the next evening, that is to say, on the evening of Monday, May 3, 1886, Engel and Fischer were also present at the meeting in the basement of Greif's Hall, and actively participated in the proceedings there taken. Among those assembled at this meeting there had been distributed a certain circular, written that afternoon by the defendant Spies, known as the "Revenge Circular." This circular will be hereafter more particularly referred to. It alleged that six workmen had been killed by the police on that very afternoon at a disturbance in the southwestern part of the city, and called upon the workmen to arm themselves and "avenge the atrocious murder which had been committed upon your brothers to-day and *which will likely be committed upon you to-morrow.*"

The contents of the circular were discussed and suggestions were made as to what should be done *within the next few days.* The defendant Engel then presented to the representatives of all the groups the plan which had been accepted at his suggestion on the day before by the Northwest side group alone. There was some opposition to it. One member "thought that there was too few of us, and it would be better if we would place ourselves among the people and fight right in the midst of them. There was some opposition to that, to be in the midst of the crowd, as we could not know who would be our nearest neighbor of the crowd; there might be a detective right near us or some one else." *The plan of Engel was, however, finally adopted.* The several features of the plan adopted on Monday evening deserve special consideration in view of the occurrences at the Hay-market on the succeeding evening.

First. As to the attacks upon the police and the police stations. It was Engel's suggestion that the members of the armed sections should come to the assistance of the workmen whenever a collision between them and the police should grow out of the eight-hour strike then in progress; that a bomb should be thrown into each police station in the city, beginning with that on North avenue in the North division, and the policemen, as they rushed out of the station on account of the explosion of the bomb so thrown, should be shot down by the riflemen of the Lehr und Wehr Verein, stationed in line

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for that purpose; that the police would thus be prevented from coming from their respective stations to the scene of conflict when they should be summoned by the authorities to do so; that the different "International" bodies, after storming the stations and shooting down the police, should march inward towards the center of the city, destroying whatever should oppose them; that the telegraph wires, and the hose of the firemen, should be cut; that the ranks of the Internationals would gain large accessions from the workingmen as soon as these attacks upon the police should be begun.

Second. As to the signal for the inauguration of the attacks upon the police. The defendant Fischer suggested the German word "Ruhe," the signification of which in English is "rest" or "peace," as a signal word to be adopted by the meeting. His proposition was agreed to. By the terms of it, whenever the word "Ruhe" should appear in the letter-box column of the Arbeiter Zeitung, it was to be understood that the "social revolution" had begun; the publication of that word in the paper named was to be a signal to the members of the "armed sections" of the various groups that they were to arm themselves and repair to certain specified meeting places, and when they should there be informed by report from a committee hereinafter named that a collision or conflict had taken place between the police and the workingmen, they were then to proceed to attack the stations and the policemen therein with bombs and rifles, as already stated.

Third. As to the Hay-market meeting. The third feature of the meeting of the armed sections on Monday night was the arrangement made for a mass meeting on Tuesday evening at the Hay-market square. The chairman who presided on Monday night suggested the holding of the mass meeting on the next morning, that is to say Tuesday morning, at 10 o'clock, in the Market square in the South division of the city. The defendant Fischer, however, objected to both the time and place designated by the chairman. He advocated the holding of the mass meeting on Tuesday evening rather than Tuesday morning, and at the Hay-market square instead of the Market square. His proposition was accepted by the members of the armed sections, and it was then and there agreed that the Tuesday evening meeting should be announced through a hand-bill. The defendant Fischer was commissioned to have

this hand-bill printed, and for that purpose left the Monday night meeting while it was in session. He returned in about half an hour, and reported that the printing-office was closed. He, however, had the hand-bill printed the next day, as will be seen hereafter.

Leaving for the present the discussion of the provisions made on Monday night for the gathering at the Hay-market, it will be necessary to notice —

Fourth. The appointment by the armed sections of a committee. As a part of the plan adopted on Monday night, a committee consisting of one or two from each group was appointed, the business of which was to be present at the Hay-market and "to observe the movement not only on the Hay-market square, but in the different parts of the city, and if a conflict should happen," to report to the members of the armed sections at their various meeting places, as above indicated. This committee was also intrusted with the task of publishing the word "Ruhe" in the Arbeiter Zeitung, when, in their judgment, the occasion for doing so should arise. As we understand the evidence, this same committee was to have the general control of the Hay-market meeting.

Fifth. A resolution was passed that the details of the plan adopted by those present on Monday night should be communicated to absent members who could be relied upon

Rudolph Schnaubelt, whom a part of the evidence identifies as the thrower of the bomb on Tuesday night, suggested that the plan adopted should also be communicated to comrades living in other cities, so that the revolution should be commenced in other places as well as in Chicago. This suggestion, however, does not seem to have been acted upon by the Monday night meeting.

Returning now to a consideration of the appointment of the Hay-market meeting, considered as a part of the Monday night plan, we think the jury were warranted in believing, from the evidence, that that meeting was not intended by those who made the arrangements for holding it, to be a peaceable assemblage.

First. The resolution which provided for calling it was adopted by a secret gathering of the armed sections of the International groups. The record reveals many circumstances tending to show that a conflict was to be precipitated between

the police and the twenty-five thousand workingmen who were expected to be present at the Hay-market. As one of the witnesses expresses it, it was to be held "to cheer up the workingmen so that they would be prepared if a conflict should happen."

Second. The defendant Fischer, in the discussion on Monday night, assigned as a reason why the proposed mass meeting should not be held at Market square, that the latter place was a "mouse-trap." This remark, under all the circumstances of the case, could have had no other meaning than that the conflict which was expected to occur might be too easily quelled by the authorities if it took place at Market square. If the assemblage was to be entirely peaceable and lawful in its character, it could make no difference whether the place of its meeting was a "mouse-trap" or not. That the spot selected was not a mouse-trap will appear from an examination of the locality and its surroundings.

The Hay-market is a widening of Randolph street, which runs east and west. It begins on the east at Desplaines street and terminates on the west at Halstead street, the latter streets running north and south and crossing Randolph street at right angles.

The speakers were not on the Hay-market itself but on Desplaines street, at a point a little more than a hundred feet north of the eastern end of the Hay-market. They made their speeches from a truck wagon, which stood on the east side of Desplaines street, next to the sidewalk, and at a point about five or six feet north of the western end of Crane's alley, the pole end of the wagon looking to the north and the rear end to the south. Crane's alley begins on Desplaines street at a point ninety feet north of Randolph street, and runs east a short distance and then turns south into Randolph street. Lake street is the next street north of and parallel with Randolph street; and between it and Crane's alley is still another alley, running east from Desplaines street to Jefferson street, and tapped at a point half way between the latter streets by an opening extending north to Lake street. Between the Hay-market on the south and Lake street on the north, a small street, called Eagle street, runs westward from Desplaines street to Halstead street, crossing Union street, which runs north and south between the two streets last named.

Between Crane's alley and the alley north of and parallel with it is the manufacturing establishment of Crane Bros., a large building, closed and unlighted at night, and in the shadow of which stood the wagon of the speakers. Some boxes had been placed on the edge of the east sidewalk of Desplaines street a few feet south of the alley, furnishing a protection from the observation of those in the middle of the street.

On Lake street, just north of the wagon, were many gathering places of the workmen, such as Greif's Hall, Zell's Hall and Florus Hall. There were also several such places to the south on Randolph street. On Tuesday night the halls and saloons in the neighborhood were crowded with workmen who were out of employment by reason of the strikes and other disturbances incident to the eight-hour movement, and whose feelings at this time were hostile to the police by reason of the efforts made by the latter to stop the attacks of strikers upon non-union laborers.

It will thus be seen that all the surroundings of the wagon, in the way of streets, alleys, halls, buildings, sympathetic crowds, etc., furnished easy means of approach, escape and concealment. As a mere strategical point, no better position could have been selected for the occurrences, which actually took place on Tuesday night, than the spot where the speakers' wagon was located.

Third. The language of the hand-bill, calling the Haymarket meeting, which was issued in pursuance of instructions from the armed sections assembled in Greif's building on Monday night, shows that the meeting was not intended to be altogether peaceable. On Tuesday morning at a quarter past 7 o'clock, Fischer went to a printing office at the corner of Randolph and Market streets, and procured the hand-bill in question to be printed. It is as follows:

ATTENTION, WORKINGMEN!

GREAT

MASS MEETING

TO-NIGHT, AT 7:30 O'CLOCK,

AT THE

HAYMARKET, RANDOLPH ST., BET. DESPLAINES AND HALSTEAD.

Good speakers will be present to denounce the latest atrocious act of the police, the shooting of our fellow-workmen yesterday afternoon.

Workingmen, Arm Yourselves and Appear in Full Force!

THE EXECUTIVE COMMITTEE.

The testimony is abundant that many copies of this hand-bill, containing the words: "Workingmen, arm yourselves and appear in full force," were printed in German and English and distributed among the workingmen throughout the city on Tuesday, May 4, 1886. Why urge men to come armed to an assemblage, if the assemblage is to be peaceful, especially where such arming is in violation of the law of the state?

It is true that, at a later hour in the day, on Tuesday, a number of hand-bills were distributed which were exactly the same as above, with the exception that the words "Arm yourselves and appear in full force" were omitted. But the evidence shows that the objectionable words were only left out of the second set of hand-bills through fear that they might deter some of the workmen from attending the meeting.

All the hand-bills, however, both those with and those without the objectionable words, declared the object of the meeting to be, not to discuss the eight-hour movement, but to "denounce the latest atrocious act of the police, the shooting of our fellow-workmen yesterday afternoon." What was the act of the police on Monday afternoon for which they were to be denounced?

A manufacturing company in the southwestern part of the city had employed certain laborers belonging to organizations styled "Unions," and hence called "Union laborers." These "Union" workmen had inaugurated a strike and quit work. The company employed in their places other workmen, not connected with the "Unions," and called "Non-union" workmen. The striking "Union" laborers and certain "lumber shovers" had made a most violent attack not only upon the "Non-union" laborers, but upon the buildings and property of the company. The police had been summoned to quell the riot, and, as the result of their efforts to do so, one person, and not six, had died from the effect of wounds received on that occasion.

The city authorities did their duty when they ordered the police to stop this unjustifiable attack of the union workmen, reinforced by striking lumber-shovers, upon men who were pursuing their lawful business. It follows that the Hay-market meeting was called for the purpose of denouncing the officers of the law because they had done their duty.

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TIVE COMMITTEE.

Fourth. The testimony of Waller and Seliger shows that some trouble, not clearly defined in the language of unlearned witnesses speaking through an interpreter, was expected to take place at the Hay-market meeting. The discussions at the Monday night meeting indicated such an expectation. What other construction can be placed upon such language as this, used at that meeting: "It would be better if we would place ourselves among the people and fight right in the midst of them; we could not know who would be our nearest neighbor of the crowd; there might be a detective right near us," etc.?

One of the witnesses says that "it was planned to attack the police stations to prevent the police from coming to aid, if there should be a fight in the city," and that those present Monday night expected there would be a fight. That this fight was expected to take place at or near the Hay-market would appear from the fact that, as soon as the stations were blown up, the armed men and the workmen joining them should march "to the heart of the city," where the fight would commence in earnest. The Hay-market was in the heart of the city. Lingg stated to Seliger on Tuesday night "that there should be made a disturbance everywhere on the North side to prevent the police from going over on the West side." If the place to which the police were to be kept from going by the attacks upon the stations was in the heart of the city and on the West side, it could not have been very far from the Hay-market square.

Fifth. The same committee which had charge of the Hay-market meeting, and had the power to cull together the armed men at their meeting-places by the insertion of the word "Ruhe" in the Arbeiter Zeitung, was also instructed to attend at the Hay-market and from there carry reports to them at their meeting-places. The thing they were to report to the armed men was a conflict with the police. As they were to attend at the Hay-market and report from there, a conflict must have been expected there.

That the plan adopted on Monday night, with its provisions for bomb-throwing, shooting, meeting-places, signal committee, mass-meeting, communication with absent members, etc., was an unlawful conspiracy, there can be no doubt.

The question now arises whether the murder of Degan was committed in pursuance of this conspiracy and as one of the objects to be attained by it, and whether the murder occurred while the parties to the conspiracy were engaged in such prosecution of it that Degan's death is to be considered the natural and necessary outcome and consequence of that prosecution? In other words, were the occurrences of Tuesday night the result of the conspiracy of Monday night? Was that which was done on Tuesday night done for the purpose of carrying out the plan of Monday night?

First. The main feature of the Monday night plan was the provision for throwing a bomb into each police station and then shooting down the policemen as they should come out. This provision had two parts: first, a bomb was to be thrown, creating destruction and confusion; second, in the midst of the confusion following upon the explosion of the bomb, the members of the armed sections and the riflemen of the Lehr und Wehr Verein were to fire into the policemen and destroy them before they could recover from their surprise. Did this feature correspond with either or any of the events of Tuesday night? In order to determine whether it did or not, it is necessary to notice some of the occurrences which took place at the Hay-market meeting.

The crowd in attendance there was in the middle of Desplaines street, and on the Desplaines street sidewalks to the south of the wagon, and extended around into the Hay-market to the west, and up into Lake street to the north. Those appearing to be most in sympathy with the speakers were near the mouth of Crane's alley and on and around the wagon.

The station where the policemen had been holding themselves in readiness during the meeting was located on the west side of Desplaines street, seventy-five feet south of the Hay-market and some three hundred feet or more south of the wagon, and between Randolph street on the north and Washington street on the south, the latter being the next street south of and parallel with Randolph street. Some electric lights in front of a theater on Desplaines street, south of the station and in the neighborhood of Washington street, served to light up at least that portion of Desplaines street south of the Hay-market.

The police formed in line on Waldo place, a small street running west from Desplaines street and on the south side of the station house. They marched in regular order — with their hands down, clubs in their belts, and pistols in their pockets — northward upon Desplaines street, across the eastern end of the Hay-market, until they came “about to the mouth of Crane Bros.’ alley.” Here they halted, their front line being only a few feet south of the south end of the wagon. One of the officers in command then gave an order to disperse, as has already been stated.

The language in which the order was uttered is as follows: “I command you, in the name of the people of the state of Illinois, to immediately and peaceably disperse.” These words are the same as those used in section 253 of division I of the Criminal Code of this state, which provides that “when twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, . . . it shall be the duty of each of the municipal officers . . . to go among the persons so assembled . . . and in the name of the state command them immediately to disperse.”

If the police officers had improperly intruded upon the meeting in question, such intrusion would have furnished no justification for the attack hereinafter mentioned. Persons injuriously affected by such improper intrusion or illegal dispersion had their remedies at law for damages sustained; or they could have demanded an investigation before the proper authorities, and, upon proving their charges, could have obtained the dismissal of officers guilty of infringement upon their rights as citizens.

We cannot say, however, that in view of all the facts and circumstances surrounding the occasion, the police officers were justly chargeable with exceeding their authority in the premises. Much disturbance and disorder existed in the city. Many strikes had recently occurred among the laboring men, many of whom were out of employment and smarting under feelings of discontent. It had been reported to the authorities that the riot already referred to of the preceding afternoon in the southwestern part of the city had been mainly incited by a speech delivered to some “lumber shovers” on the “Black

Road" by the defendant Spies, who was observed to be the most active spirit at the Hay-market meeting. Copies of the "Revenge circular" and of the hand-bill prepared by the defendant Fischer had fallen into the hands of the police. A rumor had also come to their headquarters that it was the intention of parties at the Hay-market meeting to proceed to some neighboring railroad freight houses where non-union laborers were employed, and blow them up. In addition to all this, it was reported to the officer in command of the force at the Desplaines street station, that the defendant Fielden, who was then speaking, had just used the following language: "You have nothing more to do with the law except to lay hands on it and throttle it until it makes its last kick. . . . Keep your eye upon it, throttle it, kill it, stab it, do everything you can to wound it;" and that the use of these words had produced great excitement and caused noisy demonstrations around the wagon. Upon the reception of this report the officer in command decided upon the dispersion of the meeting, and his men made the movement for that purpose, as already stated.

As soon as the order to disperse was given, the defendant Fielden descended from the wagon, making use of the words, "we are peaceable." Whether or not these words were uttered as the English equivalent of the German word "ruhe," which meant "peace," the evidence does not conclusively show.

Certain it is, that no sooner had Fielden said "we are peaceable" than *the bomb exploded, and in a few seconds thereafter a volley of shots were fired.*

Whether the crowd, which, upon the advance of the police in the middle of the street, had scattered to the north of the wagon and to the sidewalks upon the east and west sides of Desplaines street, fired into the police or not, is one of the disputed questions in the case. According to the testimony for the state, persons in the street and upon the sidewalks discharged their revolvers into the midst of the police, some of the witnesses estimating the number of shots at seventy-five or one hundred. On the other hand, witnesses for the defense swear that the only shooting which was done came from the ranks of the police themselves. That the latter fired into the crowd after the explosion is an admitted fact, but the prosecution claims that they did not do so until after they were fired into.

We think the weight of evidence is in favor of the state upon this subject. If it be conceded that the witnesses for the prosecution, who are, for the most part, policemen, are interested on one side of the question, and that the witnesses for the defense, who are, for the most part, partisans of or sympathizers with the prisoners, are interested on the other side of the question, there is yet other evidence which seems to be decisive of the matter.

The testimony of the surgeons, who are entirely disinterested, shows that two police officers died from the effects of bullet wounds, and that many more, who did not die, received bullet wounds. As the policemen were a solid body of well-drilled men, standing together in the street in well-formed lines and orderly ranks, it is impossible that they should have shot into their own midst. This being so, the bullet wounds received by them must have been caused by shots from the crowd in their front and on their sides.

In addition to this, it has already appeared that many of the persons around the wagon had been preparing for a long time for the events expected to grow out of the eight-hour movement on May 1, 1886, by exercises in drilling, by the purchase of arms, by experiments with dynamite, and had been repeatedly urged in speeches, in newspaper articles, and by the circulars already mentioned, to meet those events in a state of armed preparation.

Moreover, several of the newspaper reporters confirm the statements of the policemen that shots were fired from the sidewalks into the police. One of the reporters saw several men around the wagon boldly exhibiting their revolvers while the speaking was going on. A revolver was found on the sidewalk near the wagon, several barrels of which had been discharged.

It is apparent from this review of the evidence, that just such an attack was made at the Hay-market as was contemplated and arranged for by the conspiracy of Monday night. First, a bomb was thrown among the policemen; next, shots were fired into their ranks by armed men belonging to the organizations heretofore described and who had been gathered around the wagon during the evening. In the order of time, the shooting occurred a few seconds after the bomb exploded. This is the order in which the onset with the two different

kinds of weapons was to be made, according to the terms of the conspiracy. The mode of attack as made corresponded with the mode of attack as planned.

It is true that the plan adopted contemplated the throwing of a bomb into each *station* and then shooting down the police *as they should come out*. This was to be done, however, not only at the North avenue station, but at stations "in other parts of the city." The Desplaines street station was a station in one of the "other parts of the city," and was as much embraced within the scope of the plan as the rest of the stations. It was in sight of the speakers' wagon and only a short distance south of it. If a bomb had been thrown into the station itself and the policemen had been shot down while coming out, a part of the conspiracy would have been literally executed just as it was agreed upon. It could make no difference in the guilt of those who were parties to the conspiracy that the man who threw the bomb, and his confederates, who fired the shots, waited, before doing their work, until the policemen in the station had left it and had advanced some three hundred feet north of it.

If A. hire B. to shoot C. at the Sherman House in the city of Chicago on a certain night, but B., seeing C. enter the Tremont House on the same night, shoots him there, A. is none the less guilty of aiding, abetting, advising and encouraging the murder of C. If there is a conspiracy to kill policemen at a station-house, but the agents of the conspiracy kill the policemen a short distance away from the station-house, there is no such departure from the original design as to relieve the conspirators of responsibility.

A plan for the perpetration of crime or for the accomplishment of any action, whether worthy or unworthy, cannot always be executed in exact accordance with the original conception. It must suffer some change or modification in order to meet emergencies or unforeseen contingencies.

The International groups, as will be seen hereafter, had received information that the police intended to hold themselves in readiness for the expected outbreak *at their respective stations*. The presence of one hundred and eighty policemen at the Desplaines street station, only seventy-five feet south of the Hay-market, seemed to contradict the correctness of this

information, and to indicate a *concentration* instead of a *scattering* of forces on the part of the authorities. Such action by the authorities may have operated to change the original conspiracy for separate attacks upon the stations, and may have led to the concentration of a larger number of armed men at the Hay-market than was at first intended.

This appears from the language of Spies in his speech from the wagon, when he said: "It seems to have been the opinion of the authorities that this meeting has been called for the purpose of raising a little row and disturbance," etc., and when he asked "what meant this array of gatling guns, infantry ready to arm, patrol wagons and policemen?" It appears from the excited demeanor of Schwab, who says that he went from the Arbeiter Zeitung office to the Hay-market, passing through the tunnel and walking on Washington street, and that he turned from Washington street north on Desplaines street. This course would take him by the Desplaines street station, where he must have seen the policemen forming on Waldo place. Just after this he is described by two witnesses as rushing along hurriedly and almost running into the mayor; and by one witness as engaged in a conversation a few moments later with Spies, in which the word "police" was used. Fischer and Waller also noticed the mounting of patrol wagons on Waldo place, and indulged in some conjectures as to what it meant. Some change of programme would also seem to be indicated by the delay in opening the meeting. It was not called to order until half-past 8 or 9 o'clock, although the hour stated in the hand-bills was half-past 7. It was not actually opened until Lingg had deposited the bombs at No. 58 Clybourne avenue. He was evidently slow in his preparations. Mrs. Seliger says that her husband and Lingg, and Huebner and Thielen, and Hermann, and some others whose names she did not know, were at work on the bombs at her house until past 7 o'clock. From the fact that Seliger and Lingg were met on their way to Neff's Hall by Munsenberger, the blacksmith, it would appear that the latter had been sent forward to hasten their movements.

The various details here related tend to show that some occurrence had taken place which had not been expected or provided for.

But notwithstanding the fact that the Monday night conspiracy may have been varied somewhat to suit the new conditions, we think the jury were warranted in believing that the bomb was thrown and the shots were fired as part of the execution of that conspiracy.

Second. The second feature of the Monday night conspiracy was the publication of the signal-word "Ruhe" in the Arbeiter Zeitung, an afternoon paper, issued every day at 2 o'clock. The word "Ruhe" was published in the Arbeiter Zeitung on the afternoon of Tuesday, May 4, 1886, about five hours and a half before the hour at which the Hay-market meeting was called. It appeared in the letter-box column in heavy type and heavily underscored. Its publication announced the arrival of the social revolution; it was a call issued to the armed sections to arm themselves and repair to their meeting places and await orders. Here certainly was an execution of a part of the conspiracy shortly before the opening of the meeting at which the murder of Degan took place.

It is clear that the publication of the word "Ruhe" in a German paper might not be notice to the armed members of the American group, who presumably could not speak or read German. The Alarm at this time was only issued every half month. Accordingly, on Tuesday afternoon, at about the same time when the word "Ruhe" appeared in the Arbeiter Zeitung, there also appeared in one of the afternoon English papers of the city the following notice: "American group meets to-night, Tuesday, 107 Fifth avenue. Important business. Every member should attend; 7:30 o'clock sharp. Agitation Committee."

The question which here naturally suggests itself is: Was there a gathering of the armed men at their meeting-places in obedience to the call, implied in the word "Ruhe?"

The evidence does not disclose how many meeting-places there were, nor the location of all of them.

The meeting place selected for the members of the Northwest side group would appear to have been Wicker Park; but whether they actually met there on Monday night, or whether the arrangement for their doing so was given up in view of some alteration of place, such as has already been hinted at, the record does not disclose. A large number of the members of this group were at the Hay-market on that evening.

According to the testimony of Seliger as to the declaration of Lingg, Greif's Hall, or 54 W. Lake street, was a designated meeting place for some of the armed men. This hall was crowded on Tuesday night with workingmen, many of whom went over to the Hay-market.

It was only two blocks east from Desplaines street, and distant only a few minutes' walk from the wagon of the speakers. A gathering there was, in effect, a gathering at the Hay-market itself.

The meeting place for the American group on that evening was the Arbeiter Zeitung office, at 107 Fifth avenue. Twelve or fifteen members of that group met there pursuant to the published notice.

At least six of those present, including the defendants Parsons and Fielden, belonged to the armed section.

They all left and came over to the Hay-market meeting some time between half-past 8 and 9 o'clock Tuesday evening.

The meeting place of many of the armed members of the North side group on Tuesday evening was Neff's Hall. Lingg, Seliger, Lehmann, Smideke, Thielen and others were there on that evening between 8 and half-past 9 o'clock.

Many went there to get bombs. Thielen, who had secured two loaded bombs, some cartridges, and two cigar boxes full of dynamite from Lingg on that afternoon, was there a considerable portion of the evening, and is spoken of by Neff as "hanging around out in front of the saloon on the sidewalk."

We think the evidence warrants the conclusion that 58 Clybourne avenue was one of the meeting places to which the members of the armed sections repaired in pursuance of the arrangements made on Monday night.

Some of the meeting places were to be at certain "corners." The armed men were to go from their meeting-places to attack the stations. They were to attack the stations, in order to prevent the policemen from getting out of them so as to go to the scene of conflict, when they should be summoned; hence, many of the meeting places would be near the stations.

One of the stations to be attacked, and which was specifically named at the Monday night assemblage, was the North avenue station. The evidence shows that Lingg, Seliger, Lehmann, Smideke, Thielen, and two large men belonging to the Lehr und Wehr Verein, all of whom were armed with

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bombs, were seen standing and moving between 8 and 10 o'clock on Tuesday night, at corners and streets in the near neighborhood of the North avenue station.

Seliger and Lingg were also that night still further north in the neighborhood of a police station near the corner of Webster and Lincoln avenues. Others who left 58 Clybourne avenue just after the bombs had been deposited there, "went ahead" of Seliger and Lingg, so that the course taken by them must have been still further northward and in the neighborhood of Deering, where the defendant Schwab made a speech to some striking workmen about 10 o'clock on that night after he had left the Hay-market.

One or more of these meeting-places or corners was in the neighborhood of the Desplaines street station. A group of about twenty-five men were standing, on Tuesday evening, at the southwest corner of Halstead and Randolph streets, two blocks west of the Desplaines street station, and one of the witnesses speaks of seeing Spies and Schwab going into the thickest of this group between 8 and 9 o'clock. "About an hour previous to the meeting" at the Hay-market, Engel and Fischer, both members of the armed sections, were seen at the corner of Desplaines and Randolph streets. During the evening Fischer and Waller, the latter of whom is proven to have had a revolver, and both of whom belonged to the Lehr und Wehr Verein, were so near the Desplaines street station as to observe the mounting of five or six patrol wagons with policemen. The speakers' wagon itself was only a short distance north of that station, and armed men were gathered around it all the evening, as has already been shown.

Thus it is proven that armed men did gather at certain corners and meeting places on Tuesday night. There is evidence that would warrant the jury in believing that such gatherings took place in obedience to the call agreed upon at the Monday night meeting.

Third. The third feature of the Monday night conspiracy was the appointment of a mass-meeting at the Hay-market. The meeting was held and its general character has already been discussed.

Fourth. The fourth branch of the conspiracy had reference to the action of the committee that was charged with the

double duty of publishing the signal-word "Ruhe" and reporting to the armed men at their meeting-places any conflict and collision that might occur at the Hay-market or elsewhere. Did this committee attend at the Hay-market and carry reports thence to those gathered at the "corners" and other meeting places?

Upon the reception of these reports, attacks were to be made upon the police. The thing to be reported was any collision or conflict that might happen to occur between the police and workingmen. Such collisions ordinarily grew out of attempts to protect employers or non-union laborers against strikers; but that an act of interference with a meeting of workingmen would be regarded as coming within the meaning of the word "conflict" or "collision," as here understood, is apparent from Lingg's statement, made to Seliger when he first brought a bomb to the latter's house and showed him pipes and shells. This statement was, that the bombs would be used not only "on occasions of strikes," but "where there were meetings of workingmen and they should be disturbed by the police."

At the Hay-market the collision grew out of an attempt to disperse a meeting that appeared to have been called for an illegal purpose. The movement of the police upon the crowd for the purpose of effecting this dispersion was such a coming together of policemen and workingmen as would very naturally be construed by many of the conspirators or their unlearned agents to be within the meaning of the Monday night plan. To regard the advance of the police into the midst of those standing around the wagon as authorizing and justifying the attack contemplated by the terms of the Monday night conspiracy was a natural interpretation of those terms, in view of all the circumstances and of the character of the parties concerned.

As the march to the wagon and the order to disperse did not occur until the station had been left, the police were out of the station before the occasion for the attack arose, and hence the throwing of the bomb into the station itself was an unnecessary act.

Even if it be true that the committee already named made no report to the armed men at their meeting places, as contemplated by the terms of the conspiracy, it may be said that

such report was unnecessary, so far as those posted near the Desplaines street station were concerned. The only object of such reports was to give information of a conflict or collision. The armed men at the Hay-market themselves saw the collision and heard the order to disperse, and were therefore informed of the arrival of the occasion for an attack without any report from the committee.

However this may be, the evidence tends to show that certain parties did go from the Hay-market to one or more of the meeting places on Tuesday night, and that they so went as bearers of some message or communication. Whether the communication suggested by this passage of persons from point to point had any reference to the large gathering of policemen at the Desplaines street station does not appear.

Belthazar Rau, the advertising agent of the *Arbeiter Zeitung*, was one of the most active men in the promotion of the schemes of the Internationalists. As has already been stated, he exhibited a specimen bomb in August, 1885, to the central committee in session at the *Arbeiter Zeitung* office, when Seliger was present as a delegate. The written copy of the words "Y-komme Montag abend," published in "Die Fackel" on Sunday, May 2d, and calling the meeting of the armed men on Monday night, was in his handwriting. He introduced Spies to the chairman of the meeting of the lumber shovers on Monday afternoon. He distributed the "Revenge" circulars Monday evening at Zepf's Hall; he knew the meaning of the signal "Ruhe," and, according to the testimony of Spies, talked with the latter about it on Tuesday afternoon. On Tuesday night he was seen moving around the crowd on the Hay-market.

On that evening he made two trips between the *Arbeiter Zeitung* office and the Hay-market, once in company with Schwab, and again in company with Fielden, Parsons and Lingg. He was seen at Zepf's Hall just after the explosion. He was in consultation with Spies, Schwab, Fricke and others at the *Arbeiter Zeitung* office on Tuesday afternoon between 5 and 6 o'clock, and on Tuesday morning between 9 and 10 o'clock he was present at the same place with Fischer, Spies, Schwab and Grueneberg at an interview with reference to the hand-bills heretofore mentioned.

Gruenhut speaks of him as being on an agitation committee

and on the committee for the Internationalists. Special mention is made of him by Herr Most in his letter to Spies.

This same Rau on Tuesday night went from the Hay-market to the meeting of the American group then in session at the office of the Arbeiter Zeitung, and in obedience to a notice from him, all those gathered there went over to the speakers' wagon on Desplaines street.

Parsons, in speaking of what took place at the Arbeiter Zeitung office, says: "Some one, I understood it was a committee, came over from the Hay-market; they stated that they came from the Hay-market, or some one told me they did." Fischer stated after his arrest that he was at the Arbeiter Zeitung office that night, and he was a member of the executive committee that called the Tuesday night meeting, as shown by the signature to the handbill.

Thus there is evidence from which the jury were warranted in believing that Fielden and Parsons and their associates were called from their meeting-place to the Hay-market by the summons of a committee.

Furthermore, about 8 o'clock, or a little before that time, on Tuesday evening, the defendant Schwab was at the office of the Arbeiter Zeitung, and several telephone messages passed between him and a carrier of that paper in the northwestern part of the city. He went over to the Hay-market, and leaving there later in the evening, took a Clybourne avenue car at the court-house and went to Deering, at or near the corner of Clybourne and Fullerton avenues. When he arrived at his destination he was standing on the back platform of the car. During his journey he passed by No. 58 Clybourne avenue, where men had just been helping themselves from the open satchel of loaded bombs; where Lingg had just inquired of Neff, the saloon-keeper, if "some one had been there asking for him;" where Thielen, who had been with Lingg that afternoon while he was making bombs, was "hanging around . . . out in front of the saloon on the sidewalk." During the journey he passed the intersection of Larrabee street and Clybourne avenue about the time that Seliger, Lingg, Smideke and Lehmann were standing there. He passed the intersection of North avenue with Clybourne avenue a short distance west from North avenue station, which had been especially singled out for

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attack. His course was near the spot where two large men armed with bombs, members of the Lehr und Wehr Verein, had been seen standing on that night, and from which they had gone ahead towards the north. It was said at the Monday night meeting that when the police station should be attacked the Internationals hoped to gain accessions from the workingmen. Schwab went late on Tuesday evening to address several thousand workingmen assembled at a point not a great distance north from the stations visited on that evening by Seliger and Lingg, and in order to reach the point in question went directly by the meeting place of the North side group, to which he himself belonged, and among the corners where armed members of that group had been hovering all the evening as if in expectation of some order or signal.

There is no direct or positive evidence that he passed by No. 58 Clybourne avenue and the corners in the neighborhood as a member of the committee referred to, for the purpose of summoning to the Hay-market some one or more of those who had helped themselves to Lingg's bombs.

But there are circumstances which, taken in connection with all the other evidence in the case, point very strongly in the direction here indicated.

The evidence of the defense tends to show that Schwab's trip to Deering had no other object than an address to the workingmen, that Rau's visit to the Arbeiter Zeitung was for the sole purpose of getting speakers for the Hay-market, and that the American group met at the office of the Arbeiter Zeitung on that evening to effect an organization of the sewing girls. It was for the jury to say whether the evidence of the defense upon this subject was of more weight than the various circumstances already detailed, which, we think, the jury had a right to look at it in the light of the principles advocated by the International organization, and in the light of the particular methods recommended by that organization for concealing its real designs. The Arbeiter Zeitung, in its instructions "about revolutionary deeds," as found in its issue of March 16, 1885, says that where a special group is formed for the purpose of action, "the public groups have to serve as a covering, as a shield behind which one of the most effective weapons of revolution is bared;" that the danger of discovery

ought to be weakened as much as possible, and, if it can be, should be reduced to naught."

Fifth. The fifth feature of the plan under consideration was the resolution to communicate its details to the absent members.

The record furnishes no direct evidence upon this subject, but it shows that persons who were present at the meeting on Monday night were in the company of several of the defendants on Tuesday and Tuesday night. Rudolph Schnaubelt was in consultation with Schwab and Spies on Tuesday night, and was on the wagon that evening with Fielden and Parsons. During the day on Tuesday Rau and Fischer were in the Arbeiter Zeitung building with Spies and Schwab, and were there in the evening while Fielden and Parsons were in attendance upon the gathering of the American group.

We have thus reviewed somewhat in detail a number of the events of Tuesday night, with a view of seeing whether they took place in accordance with and in pursuance of the provisions of the Monday night plan. Viewed as evidences of a correspondence between what was done and what was planned, some of the occurrences here noted may be unimportant; but taking all the circumstances together, the jury were justified in finding that the actors upon the stage of Tuesday night's tragedy were playing the parts assigned to them in the conspiracy of the previous night, and that the death of Degan occurred as a part of the execution of that conspiracy, and while the parties to it were engaged in carrying it out.

The last and most important question to be considered is: Were the plaintiffs in error parties to the conspiracy formed on the evening of Monday, May 3, 1886?

LINGG.

The jury were warranted in believing from the evidence that the plaintiff in error, Louis Lingg, was a party to the Monday night conspiracy.

According to the testimony of the captain of the police, Lingg admitted after his arrest that he was present on that evening in the basement of Greif's Hall. If he was, then his presence there, taken in connection with his subsequent conduct, would tend strongly to establish his connection with the plot. It is

claimed by the defense that he was in attendance all the evening at a meeting of the Carpenters' Union in Zepf's Hall on Lake street, at the northeast corner of Lake and Desplaines streets, two blocks west of Greif's Hall, and about half a block north of the spot where the speakers' wagon was located on the next night. He certainly was at Zepf's Hall during a part of the evening, but may have gone over to the other meeting in session at Greif's Hall. A public announcement was made to those assembled in Zepf's Hall, requesting all who belonged to the armed section to go over to the basement of 54 W. Lake street. Schrade says he went to the latter place from the gathering of the Carpenters' Union because of an announcement that "the members of the L. U. W. V. should go round to the meeting on Lake street." This announcement certainly informed Lingg that the armed sections were in session at a place just two blocks east of him.

It would make no difference, however, in view of his acts and declarations, whether he was at the meeting Monday night or not. "Though the common design is the essence of the charge of conspiracy, it is not necessary to prove that the defendants came together and actually agreed in terms to have that design and to pursue it by common means. If it be proved that they pursued by their acts the same object, often by the same means, one performing one part and another another part of the same, so as to complete it with a view to the attainment of that same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object." . . . 3 Greenleaf on Ev., sec. 93.

Let us examine some of Lingg's acts and declarations.

The plot of Monday night required the use of bombs to carry it into effect. Lingg and his assistants were making bombs on Tuesday. He brought dynamite to Seliger's house on Friday, but made no preparations to fill bombs with it until the day of the Hay-market meeting. He knew all about the details of the conspiracy. On Tuesday night he told Seliger the meaning of the word "Ruhe," and that its insertion in the paper had been provided for in the meeting of the previous night. He took a copy of the paper at Seliger's house and showed him the signal word in the letter-box column. On Monday night, about the time the meetings at Zepf's Hall and

Greif's Hall were adjourning, he came up behind Lehmann and several other members of the armed sections, who were standing on the sidewalk at the entrance to Greif's Hall, and reproached them for their stupidity, calling them fools and oxen. When Lehmann, who had been standing guard most of the evening on the outside to prevent intruders from entering the basement, asked him what had taken place at the meeting they were just leaving, he said in reply that "if they wanted to know something they should come to 58 Clybourne avenue the next evening." Lehmann did go to 58 Clybourne avenue the next evening, in obedience to this injunction. As has been already stated, Lingg carried loaded bombs there and spread them out, so that members of the International groups could help themselves to them. His remark to Lehmann shows that what he did on Tuesday night was done in pursuance of a resolution formed on Monday night. Thielen, Hermann, Huebner and Lehmann, who were with him on Tuesday afternoon, while he was making bombs, were all present at the Monday night meeting.

We regard it as a very significant circumstance, as showing the connection between the conspiracy of Monday night and the bomb-making of Tuesday afternoon, that parties who are proven without any contradiction whatever to have been at the meeting in the basement of Greif's Hall on Monday night, and to have belonged to the band of conspirators that met there, went to Seliger's house on the very next afternoon, and were there associated with Lingg in making the bombs that he carried to Neff's Hall Tuesday night. It was as late as 11 o'clock on Monday night when Lingg told Lehmann and several other members of the armed sections to come the next night to Neff's Hall. It was as early as 7 o'clock on the very next morning when he set Seliger to drilling holes in the bombshells and instructed him to get bolts to fasten the shells together, accompanying his instructions with the statement that the bombs would be taken away that day. Lingg said on Tuesday afternoon, while he and his assistants were at work at the bombs, that they were to be carried to No. 58 Clybourne avenue as soon as they were finished, and *were to be used that night*, and that they were going to be good fodder for the "capitalists and the police when they came to protect the cap-

italists." When he returned to Seliger's house from the West side at 1 o'clock Tuesday he reproached Seliger with the slow progress he had made in his work. It may be here stated that six weeks before this time, when Lingg first brought dynamite to Seliger's house, he remarked that every workingman should have dynamite and learn how to handle it, as there was to be considerable agitation.

Between 9 and 10 o'clock on Tuesday night, Lingg and Seliger appeared before the North avenue station, and Lingg proposed to Seliger to throw a bomb into the station and shoot down the policemen, two of whom were sitting in front of the building. Whether their failure to carry the proposition into effect proceeded from a want of courage or from disappointment at not receiving some message or signal that was expected at Neff's Hall is not disclosed by the evidence. But the proposition itself bears a startling resemblance to the first and main feature of the Monday night plot as already noticed.

Lingg's conduct during Tuesday and on Tuesday night shows that he expected a disturbance to occur Tuesday evening. He and Seliger, and Lehmann and Schmidecke, were standing on Larrabee street, near Clybourne avenue, about half-past 9 o'clock, when either Lingg or Seliger remarked that "we should not keep together, we four, and then we went apart." He became wild with excitement after the patrol wagon, manned with policemen, had passed him and he had been unable to light his bomb soon enough to throw it at the wagon. After that, during the evening, he frequently referred to what was going to happen on the West side and at the Hay-market, and was with difficulty restrained by Seliger from going to the West side.

Seliger swears that he was present at the meeting of the Carpenters' Union on Monday night, and was there at the same time with Lingg; and he also states that, before he went, he learned that there was to be a meeting at the Hay-market on the night of the 4th of May. It would thus appear that Fischer's proposition to hold a mass-meeting at the Hay-market was the subject of consultation and arrangement among the members of the groups before he went to the gathering of the armed men on Monday night.

The proof discloses two circumstances occurring after the

explosion of the bomb on Tuesday night which tend to show Lingg's connection with the Hay-market crime. About 11 o'clock on that evening, the Lehmanns, the Hermanns, the Hagemanns and Hirscherberger, the librarian, were in Neff's saloon. Some of them had just come from the Hay-market and they were talking about the explosion of the bomb. In the midst of their conversation Lingg and Seliger entered the saloon, when one Hermann said in an energetic voice to Lingg: "You are the fault of all of it," or "that is your fault." Thereupon, a subdued conversation took place between Hermann and Lingg. This circumstance is sworn to by both Seliger and Neff, and is competent testimony as against Lingg.

After this, when Seliger and Lingg were on their way home from Neff's saloon, Lingg made the remark that he was "even now scolded — chided — for the work he had done."

The details of the plan adopted on Monday night, as the same are herein set forth, are proven by testimony which is uncontradicted. The evidence introduced by the prosecution as to the acts and declarations of Lingg on Tuesday and Tuesday night, and during several weeks prior thereto, are also uncontradicted by any testimony offered on the part of the defense, so far as we have been able to discover. What are the inferences to be drawn from these uncontroverted facts? The jury, who are the judges of the facts in criminal as well as in civil cases, have a right to draw from proven circumstances such conclusions as are natural and reasonable.

The intentions of men can only be determined from their acts. "Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought, either express or implied." Criminal Code, sec. 140. We said, in *Daivson v. The People*, 90 Ill., 221, "Malice is always presumed where one person deliberately injures another. It is the *deliberation* with which the act is performed that gives it character. It is the opposite of an act performed under uncontrollable passion, which prevents all deliberation or cool reflection in forming a purpose."

Here is a man connected with a certain organization, engaged in arming and drilling for a conflict with the police. He is experimenting with dynamite and in the construction of bombs, under the direction of armed members of that organ-

ization. He makes bomb-shells, fills them with dynamite, takes them to the meeting place of armed members of that organization, puts them where access to them can be easily had, using such precautions as such dangerous explosives naturally require. At once certain of these armed members, such as the two large men of the Lehr und Wehr Verein already spoken of, come forward and take bombs and go their several ways. In a little more than an hour afterwards one of these very bombs is thrown into a crowd of policemen and explodes and kills one of them. Was not the conduct of this man, who thus coolly and carefully prepared the weapons for one definite class of men, to use in the murder of another definite class of men, marked by "deliberation," as that term is defined in the authorities.

It was a fair conclusion from the evidence that Lingg *knew* that the bombs he was making would be thrown among the police. It was a fair conclusion from the evidence that he intended the bombs he placed in the hall-way to be used by the members of the International groups, not only in the interest of the general movement against the police with which he was connected, but in the interest of the particular conspiracy that was concocted on Monday night.

Even if he did not know the name of the particular individual who was to throw the bomb, he knew that it would be thrown by some one belonging to the sections or groups already described, and this was sufficient to affect him with the guilt of advising, encouraging, aiding or abetting the crime charged in the indictment.

He may not have known what particular policeman would be killed, whether Mathias J. Degan, or another. But when he opened the loaded satchel at Neff's Hall on Tuesday night, that act, viewed in the light of all the antecedent, attendant and subsequent occurrences, was virtually a designation of the body or class of men who were to be attacked. When one of such class was killed, the guilt was the same as though a person bearing a particular name had been pointed out as the victim.

Even if he did not know that one of the bombs would be thrown on that evening at a particular place called the Hay-market, it was sufficient that he knew it was to be used at that point in the city where a collision should occur between

the workmen and the police. Such a collision did occur at the Hay-market.

Counsel for the defense claim that there is no proof showing the bomb to have been thrown by any one of the members of the organization for whose use Lingg may have made it; that the bomb may have been thrown by some person outside of that organization and having a private grievance against the police; in other words, that the bomb-thrower has not been identified as a member of the conspiracy or as a person employed by it or acting in its interest.

We think, however, that the jury were justified in believing from the evidence that the man who threw the bomb was either a member of the conspiracy, or an agent employed by it. This appears from the facts already recited. Three circumstances especially served to identify him as being connected with the conspiracy: First, the bomb that exploded was one of the bombs made by Lingg; second, the bombs made by Lingg were finished and distributed so short a time before the explosion that they could hardly have been obtained elsewhere than from his possession or by others than those for whose use he intended them; third, the throwing of the bomb occurred almost at the same time with the firing of the shots; the latter followed so closely upon the former that the two cannot be regarded as otherwise than as parts of a joint attack, showing that the man who threw the bomb, and the men who fired the shots, were acting in unison with each other. This negatives the idea of independent action by an outside individual having a private grudge; the character of the attack as a joint one, and the concert of action between those making it, identify it as that kind of an attack which the conspirators planned to make. Moreover, there is no evidence in the record of the making of bombs by anybody except Lingg and those associated with him.

ENGEL AND FISCHER.

As to the defendants Engel and Fischer, it has already been shown that they originated the Monday night plan and procured its adoption first by the Northwest side group and second company of the Lehr und Wehr Verein on Sunday morning, and afterwards by the representatives of all the groups on Monday night. They advised and induced a band of

seventy or eighty armed and drilled men to enter into a plot to murder the police with bombs and pistols in a certain contingency, and to agree to certain details as to committee, signal-word, mass meeting, hand-bill, meeting places, etc., with a view of carrying that plot into effect. The murder of Degan took place as the legitimate consequence of an attempt to accomplish the objects of the conspiracy originated and planned by themselves. Therefore they aided, abetted, advised and encouraged the commission of that murder. Both were present at the Hay-market meeting on Tuesday night.

The evidence tends to show that Engel was at his home on Milwaukee avenue, near the Hay-market, when the explosion occurred. That some of the conspirators might be at home when the collision with the police should happen was a contingency that was provided for by the terms of the plot. In the event of a collision at night, the committee appointed to watch the movement was to report to the armed men at their homes.

It has already been stated that Fischer was at the Hay-market early in the evening, and was seen walking about on Desplaines street and in front of the station, and was present while Fielden, the last speaker, was talking. There is testimony on the part of the prosecution tending to show that he was in the neighborhood of the wagon and near the mouth of Crane's alley when the bomb was thrown. There is also testimony on the part of the defense tending to show that at that time he was in the saloon at Zepf's Hall. Zepf's Hall was just a few steps north of the wagon and in sight from it. The hall was crowded that night with workmen, and on the upper floors several meetings, among others that of the furniture workers, were in session. Between it and the Hay-market persons were passing back and forth. Fischer may have stepped into the saloon a few moments before the explosion and may have been there at the precise moment of its occurrence, although one of the newspaper reporters who was in the saloon at the time says he did not see him.

It would make no difference, however, in the degree of responsibility with which Engel and Fischer are chargeable under the facts already narrated, that they were not actually among those who stood around the wagon when the bomb was

thrown. "Where persons combine to stand by one another in a breach of the peace with a general resolution to resist all opposers, and, in the execution of their design, a murder is committed, all of the company are equally principals in the murder, though at the time of the act some of them were at such a distance as to be out of view, if the murder be in furtherance of the common design." Wharton on Homicide, sec. 338 (2d ed.); *Williams v. The People*, 54 Ill., 422.

On the morning after the Hay-market massacre, about 10 or 11 o'clock, the defendant Fischer was arrested while coming down the stairs of the Arbeiter Zeitung building. The officer found upon his person a 44-calibre self-acting loaded revolver, and also a file. He wore a belt and sheath under his coat, the belt having a brass buckle upon it with the letters "L. & W. V.," a buckle of the Lehr und Wehr Verein society. "The file, an old-fashioned three-cornered file, ground to a sharp edge, with a wooden handle, was in the sheath; the revolver was stuck in a slit in the belt; there were ten cartridges in his pocket; there was also a fuse cap—a fulminating cap—in his pocket; the fulminating cap was bright."

At Fischer's house, after his arrest, were found a box of nearly fifty 44-calibre cartridges and a light blue blouse, such as is worn by the Lehr und Wehr Verein.

SPIES AND SCHWAB.

We will now consider the relations of the defendants Spies and Schwab to the Monday night plot.

By the terms of the plot the word "Ruhe" was to be published in the Arbeiter Zeitung as a signal to the members of the armed sections to arm themselves and gather at their meeting places, there to be ready to attack the police when the committee appointed should give information of a disturbance.

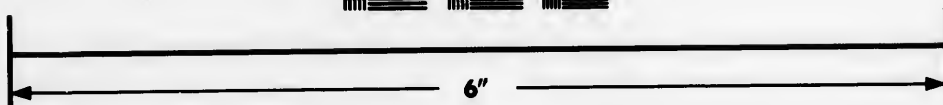
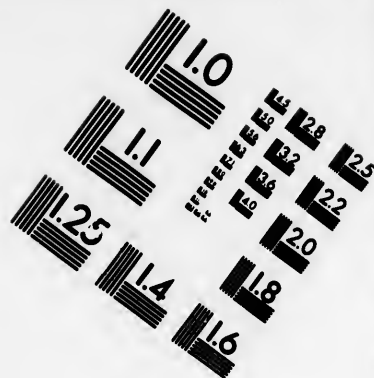
That word *was* published in the paper which was issued on the afternoon of Tuesday, May 4th. Its publication was the act of the defendant Spies. He wrote with his own hands the words "*Brief-Kasten Ruhe*," the former of which means letter-box in German; and, from the original manuscript so written by himself, the printers set up the type from which the words were printed in the paper of Tuesday afternoon.

"Ruhe" was not only in his handwriting, but he underscored it twice, as if to give it greater emphasis and prominence. If he knew its meaning as a signal word, and the object of its insertion in the paper, as explained on the night before by his own foreman, the defendant Fischer, then he was lending himself by its publication to the execution of the plan of Monday night.

"Nor is it necessary to prove that the conspiracy originated with the defendants, or that they met during the process of its concoction; for every person entering into a conspiracy or common design, already formed, is deemed in law a party to all acts done by any of the other parties, before or afterwards, in furtherance of the common design." Greenl. on Ev., sec. 93.

There is evidence tending to prove that Spies inserted this word in the International organ as a member of the committee whose business it was to do so, because that same committee was in charge of the Hay-market meeting, and he was the most active man in the management of that meeting. He himself inserted among the editorial notices in the Arbeiter Zeitung on Tuesday afternoon the following notice in almost the same words used in the hand-bill printed by Fischer: "Attention, Workingmen! Grand mass-meeting this evening at 7:30 o'clock on the Hay-market, Randolph, between Desplaines and Halstead streets. Good speakers will denounce the latest rascally deed of the police in shooting our brethren yesterday afternoon." He organized the Hay-market meeting and addressed it. He mounted the wagon and called for Parsons. He selected as the speakers' stand the wagon, with all its advantages of location, as already specified. He moved among the workingmen on the Hay-market and pressed them north into Desplaines street to the neighborhood of the wagon so selected. In his address he spoke confidently as to the intentions of the committee charged with the double duty already indicated, saying, among other things, "the committee that called the meeting wanted to tell you certain facts," etc.

In explanation of the publication of the word "Ruhe," the defendant Spies swears that its meaning was stated to him for the first time by Rau, his advertising agent, and Fischer, his foreman, on Tuesday afternoon after its appearance in the paper, and that he instructed them to speak to the armed men of its



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insertion at that time as a mistake. Rau and Fischer were not placed upon the stand to confirm this explanation; and whether it was credible, in view of his printed utterances on that day and several previous days, and in view of all the other features of his conduct, as disclosed in the record, was a matter for the jury to determine. If they did not believe his explanation as against the evidence which tended to contradict it, then they were justified in finding, from the circumstances already mentioned and those hereafter stated, that he was as much a party to the plot as Engel and Fischer and Lingg.

That plot, as has already been shown, contemplated the throwing of a bomb into each police station, and then, in the confusion, using fire-arms against the policemen. In an article upon the riot of Monday afternoon, written by the defendant Spies and published in the same Tuesday afternoon edition in which the word "Ruhe" appeared, he says: "If brothers who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with *good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate.*" Here is a suggestion of that very mode of attacking the police which was the main feature of the Monday night conspiracy. This suggestion was made to the workmen Tuesday afternoon. Tuesday night the very thing suggested took place; that is to say, a bomb was thrown, not into a station, but among the police a few feet from a station, and, after it was thrown, "good weapons" were fired into them, killing several and wounding several more. The article in question did not stop, however, with a *suggestion* of an attack upon the police in the mode specified. It closed by saying, "Last night thousands of copies of the following circular were distributed in all parts of the city;" and then quoted and republished in full the German portion of the "Revenge" circular that had been composed by Spies and distributed among the workmen on Monday night, thereby urging such workmen in the most vehement terms to arm themselves and make war upon the police. A translation of this German circular is given hereafter.

The reason why the plan of Monday night provided for throwing a bomb into each police station and shooting the escaping policemen was, that the latter might be thereby pre-

vented from going to the scene of the disturbance which was expected to take place. Such plan would naturally be based upon information that the police intended to hold themselves in readiness at their stations for a summons to some point of conflict. On the afternoon of April 30, 1886, being the Friday preceding the Tuesday on which the Hay-market meeting occurred, the Arbeiter Zeitung, in an editorial written by one or the other of its two editors, Spies and Schwab, thus addressed its three thousand six hundred readers among the members of the International groups and the unions of the workingmen:

"As we are informed from reliable sources, the police have received secret orders to keep themselves prepared in their stations, as a labor conflict is feared on Saturday of next week. You see, the capitalistic sluggards are thirsty for the blood of workingmen. The workingmen will not permit themselves to be kicked by them like dogs any more. They will not be tortured to death any more by unlimited work, and they will not be starved any more. For this opposition they want vengeance, and they cry for blood. May be that this cry will be heeded — but then, beside the red life-sap of the extortioner's victim, there may flow a little of the black-dragon poison of the extortioner. To the workingmen we again say at this hour, arm yourselves. You have but one life to lose. Defend that with all means. And in this connection, we want to caution the armed workingmen as yet to conceal their arms so that they will not be stolen by the minions of the law, as it has happened in various instances."

Here was a statement that the police had "received secret orders to *keep themselves prepared in their stations*" for a labor conflict expected to occur in about a week, which statement was accompanied with a caution to the workingmen to arm themselves and to conceal their arms. The injunction to arm could have had no other object than to meet the preparations which the police had received secret orders to make. Such preparations could be of no avail if the stations should be blown up and the police themselves should be shot down. Therefore, the plan of Monday night was exactly adapted to rendering the action of the police in keeping themselves prepared in their stations useless and of no effect. So exactly

does the plan in question fit the state of things spoken of in the editorial of April 30, that it would appear to have been suggested by that editorial.

When it is remembered that, on the very day on which this editorial made its appearance, Lingg brought to Seliger's house the large box of dynamite already alluded to, and that, on the next Sunday morning, Fischer, who, as foreman of the Arbeiter Zeitung, was all the time at work under the eyes of Spies and Schwab, went, in company with Engel, to a meeting of the second company of the Lehr und Wehr Verein and the Northwest side group, where the plan for destroying the stations and their occupants was adopted upon the suggestion of Engel, it would appear that the defendants Spies and Schwab not only joined the conspiracy now under discussion *after* it was formed, but inspired the conception of it *before* it was formed.

The armed men who met and entered into that conspiracy on Monday evening were called together by the Arbeiter Zeitung, of which Spies and Schwab were the editors and managers. In the edition called "Die Fackel," issued on Sunday, May 2d, and in the issue of the afternoon of Monday, May 3d, there were published, in the letter-box column, the words: "Y—Komme Montag Abende" (Y—Come Monday night). This was a summons to the armed sections to meet, as they did, on Monday night at Greif's Hall. The original manuscript from which the words were printed for the Sunday issue was in the handwriting of Rau, advertising agent for the Arbeiter Zeitung, member with Spies of the bureau of information, and distributor for Spies of the "Revenge" circular. The printing of the call twice, on both Sunday and Monday, indicated the importance of the matters to come before the meeting.

In his testimony Spies says of the "Revenge" circular: "I wrote it to arouse the working people, who are stupid and ignorant, to a consciousness of the condition that they were in." In the circular, as above quoted, he uses the words, "Avenge the atrocious murder which has been committed upon your brothers *to-day* (Monday) and which will likely be committed on you *to-morrow* (Tuesday)." In the minds of "stupid and ignorant" workmen, already excited about the eight-hour day of labor, the language here quoted could mean

nothing else than that an attack, similar to the one which took place in the southwestern part of the city on Monday, would probably be made upon the workmen by the police on Tuesday.

Again, in the issue of the *Arbeiter Zeitung* published on Sunday, May 2d, it is said: "Everything depends upon quick and immediate action. The tactics of the bosses are to gain time; the tactics of the strikers must be to grant them no time. *By Monday or Tuesday the conflict must have reached its highest intensity, else the success will be doubtful.* Within a week the fire, the enthusiasm, will be gone, and then the bosses will celebrate victories."

Here is another designation of *Tuesday* as the day when the excitement would be the most intense. The conduct of Spies and Schwab during the few days preceding May 4th and on that day, as evinced by their utterances in the *Arbeiter Zeitung* and otherwise, shows a constant effort to increase the enthusiasm to the highest pitch.

They advised "stupid and ignorant" workmen to arm themselves, and then sought by vehement appeals to urge them on to "quick and immediate action."

For instance:

On Wednesday, April 23th, they said: "The power of the associate manufacturers and their state must be met by labor associations. The police and soldiers who fight for that power must be met by armed armies of workmen; the logic of facts requires this; arms are more necessary in our times than anything else. Whoever has no money, sell his watch and chain to buy fire-arms for the amount realized. Stones and sticks will not avail against the hired assassins of the extortionists. *It is time to arm yourselves.*"

On Thursday, April 29th, they said: "If the legitimate means of the thieves and scoundrels who practice extortion on their fellow-men are exhausted, then they resort to force. *A wage-slave who is not utterly demoralized should always have a breech-loader and ammunition in his house.*"

On Friday, April 30th, they said what has already been quoted from the editorial of that date, and on the same day they further said, in another article: "What will the 1st of May bring? The workmen bold and determined! . . .

Men of labor, so long as you acknowledge the gracious kicks of your oppressors with words of gratitude, so long you are faithful dogs. . . . *They are enraged, and will attempt, through hired murderers, to do away with you like mad dogs.*"

On Saturday, May 1st, they again said to the workmen in the Arbeiter Zeitung: "Away with all rolls of membership and minute books where such are kept. Clean your guns, complete your ammunition. The hired murderers of the capitalists, the police and militia, are ready to murder. No workingman should leave his house in these days with empty pockets."

On Sunday, May 2d, in the same editorial which urged quick and immediate action, and designated Monday or Tuesday as the time when the conflict would have reached its highest intensity, they used the following language: "Everywhere the workmen are willing to accept a corresponding reduction of wages with the introduction of the eight-hour system; they were mostly refused. 'No, ye dogs; you must work ten hours; that's the way we want it; we're your bosses.' Something like this was the answer of the majority translated into intelligible language. In the face of this fact it is pitiful and disgusting, but more than that, it is treacherous, to warn the strikers against energetic, uncompromising measures."

On Monday, May 3d, in another article in the Arbeiter Zeitung they said: "The freight handlers were marching in full force from depot to depot at noon to-day. It was rumored that 'scabs' had been imported from Milwaukee. The railroad depots are occupied by special policemen, while the municipal minions of order under the command of five lieutenants have entrenched themselves in the armory. The arch-rascals have made provisions for good victuals and drink. . . . A strike will probably take place in the lumber districts. . . . The number of strikers to-day cannot be determined, but will probably amount to forty thousand. Courage, courage, is our cry. Don't forget the words of Herways: The host of the oppressors grows pale when thou, weary of thy burden, in the corner puttest the plow; when thou sayest 'it is enough.'"

But there were other occurrences during the same period which tended to incite the workmen to an attack upon the police.

While Fischer, the first foreman in the compositors' room of

the Arbeiter Zeitung, was present at the Sunday morning meeting on Emma street, Urban, a compositor of the Arbeiter Zeitung, was attending a meeting of the Central Labor Union at No. 54 West Lake street, in a room back of the saloon. Spies was present at a second meeting of the Central Labor Union at the same place in the afternoon of the same Sunday.

It was arranged at these morning and afternoon gatherings of the Central Labor Union that Spies should address the meeting of the striking lumber shovers, to be held the next afternoon on the "Black Road" in the near neighborhood of a large manufacturing establishment in the southwestern part of the city.

On Monday afternoon the meeting in question took place. It has already been referred to. The lumber shovers were "on a strike" and met to hear reports from certain committees whom they had appointed to negotiate with their employers in reference to the eight-hour movement. The immense crowd in attendance upon this occasion was addressed by Spies, as has already been stated. He spoke in the German language from the top of a freight car. His manner was excited and his gestures were violent. One of the witnesses says that while speaking "he jumped up three or four feet high." About three blocks west from the place where he was speaking was situated the factory which was employing non-union laborers, as heretofore explained. The lumber shovers at the meeting were not connected in any way with the workingmen engaged at the factory. But when the latter came out of the factory gate about 3 o'clock in the afternoon, at the ringing of a bell, an attack was made upon them by several thousand of the lumber shovers, who rushed from the freight car towards the gate, before the speaking was finished, in obedience to an order from some one on the car. A conflict ensued. The police were called out, stones were thrown, clubs were used, and pistols were fired by both the crowd and the police. Some of the policemen and several of the workingmen were wounded. One of the latter was killed, as has been heretofore mentioned.

It is admitted by the defendant Spies that upon this occasion he urged the workingmen, many of whom were armed with revolvers, to resist the attempt of the police to quell the riot.

In an account of what took place, written by himself and published on the next afternoon (Tuesday, May 4) in the *Arbeiter Zeitung*, he says:

"The writer of this hastened to the factory as soon as the first shots were fired, and a comrade urged the assembly to hasten to the rescue of their brothers, who were being murdered, but no one stirred. . . . The writer ran back. He implored the people to come along—those who had revolvers in their pockets—but it was in vain. With an exasperating indifference they put their hands in their pockets and marched home, babbling as if the whole affair did not concern them in the least. The revolvers were still cracking, and fresh detachments of police, here and there bombarded with stones, were hastening to the battle-ground. The battle was lost!"

On Tuesday afternoon Spies inserted in his paper a call for the Hay-market meeting in order to denounce the action of the police at this very riot. The Hay-market meeting was thus nothing more than a continuation of the warfare on the police, which he himself had incited and taken part in on Monday afternoon.

After his return from the "Black Road" to the *Arbeiter Zeitung* office on Monday afternoon, May 3, 1886, he wrote in English the following address, all of which except the word "Revenge" at the top is proven to have been in his handwriting:

"REVENGE! REVENGE!"

"Workmen, to Arms!"

"The masters sent out their bloodhounds—the police; they killed six of your brothers at McCormick's this afternoon. They killed the poor wretches because they, like you, had the courage to disobey the supreme will of your bosses. They killed them because they dared ask for the shortening of the hours of toil. They killed them to show you 'free' American citizens that you must be satisfied and contented with whatever your bosses condescend to allow you, or you will get killed.

"You have for years endured the most abject humiliation; you have for years suffered unmeasurable iniquities; you have worked yourself to death; you have endured the pangs of want

and hunger; your children you have sacrificed to the factory lord—in short, you have been miserable and obedient servants all these years. Why? To satisfy the insatiable greed, to fill the coffers of your lazy, thieving masters. When you ask them now to lessen your burdens, he sends his bloodhounds out to shoot you—kill you. If you are men, if you are the sons of your grandsires, who have shed their blood to free you, then you will rise in your night, Hercules, and destroy the hideous monster that seeks to destroy you. To arms, we call you, to arms. YOUR BROTHERS."

He at the same time wrote an address in the German language, of which the following is a translation:

"REVENGE! REVENGE!

"Workmen, to Arms!

"Men of labor, this afternoon the bloodhounds of your oppressors murdered six of your brothers at McCormick's. Why did they murder them? Because they dared to be dissatisfied with the lot which your oppressors have assigned to them. They demanded bread, and they gave them lead for an answer, mindful of the fact that thus people are most effectually silenced. You have for many, many years endured every humiliation without protest; have drudged from early in the morning till late at night; have suffered all sorts of privations; have even sacrificed your children. You have done everything to fill the coffers of your masters—everything for them; and now, when you approach them and implore them to make your burdens a little lighter, as a reward for your sacrifices, they send their bloodhounds, the police, at you, in order to cure you with bullets of your dissatisfaction. Slaves, we ask and conjure you, by all that is sacred and dear to you, avenge the atrocious murder which has been committed upon your brothers to-day, and which will likely be committed upon you to-morrow. Laboring men, Hercules, you have arrived at the crossway. Which way will you decide? For slavery and hunger, or for freedom and bread? If you decide for the latter, then do not delay a moment; then, people, to arms! Annihilation to the beasts in human form who call themselves rulers! Uncompromising annihilation to them. This must be

your motto. Think of the heroes whose blood has fertilized the road to progress, liberty and humanity, and strive to become worthy of them. YOUR BROTHERS."

These two addresses were printed, one in the English and the other in the German language, upon the same sheet of paper, and one above the other, as one circular. The printers in the Arbeiter Zeitung office usually stopped work at 5 o'clock in the afternoon. On this particular Monday afternoon, however, five or six of them were detained to set up the type for this circular. By direction of Spies the form was sent across the street to a printing-office at No. 88 Fifth avenue. The order was given to strike off as many as possible. Twenty-five hundred copies were printed that evening. As soon as they came from the hands of the printer they were carried away. "A dozen different parties came there after them, coming one and two at a time, taking it as fast as it came from the press." These circulars were distributed on Monday evening at various places and in different parts of the city. One of the witnesses says:

"It was a few minutes after 6 o'clock on Monday afternoon. I was standing in the doorway of the entrance of No. 54 West Lake street, talking with the proprietor of the hall, and first had my attention attracted to a circular by seeing a few of them flying through the air, and I remember distinctly picking up one and reading it at the time. Just at the moment I saw a horseman, and the distribution of the circulars was coincident with the appearance of the horseman in front of No. 54 West Lake street. My impression was that the horse was ridden west on Lake street."

Later in the evening the circulars were handed around at Greif's Hall, in the saloon, and at the meeting of the armed sections, which was in session in the basement. On the same night there was a gathering of the members of the Carpenters' Union to the number of one thousand or eight hundred men at Zepf's hall at the corner of West Lake and Desplaines streets, as heretofore stated, and the Revenge circulars were brought there and distributed by Rau, the advertising agent of the Arbeiter Zeitung. Between 9 and 10 o'clock the defendant Neebe carried a number of copies to a saloon at the corner of Franklin and Division streets, in the North division of the city, and

laid some on the counter and some on the tables, as hereafter stated.

A copy was seen by one of the witnesses at a meeting that night of the metal workers at No. 99 West Randolph street.

Another witness says that he was walking west on Randolph street Tuesday evening about half-past 7 o'clock, and somebody handed him a circular headed "Revenge" and signed "Your Brothers."

That this circular gave impulse to the action of the members of the armed sections at the Monday night meeting and inspired the adoption of the plan agreed upon is apparent from the fact that its contents were fully discussed and dwelt upon at that meeting.

The witness Gruenhut says that he was at the Arbeiter Zeitung office between 5 and 7 o'clock on Monday afternoon; that Schwab and the book-keeper and Neebe (though he is not so sure about the latter) were present while Spies was writing the Revenge circular and reading the proof-sheets of it as they came from the hands of the printer; that Spies told them of the lumber shovers' riot, from which he had just come, and of the killing of six men by the police, and deplored the fact that the workingmen had not been better armed for their defense, favoring dynamite as the most effective mode of arming; that the calling of a mass-meeting was then discussed and agreed upon among them, and it was agreed that the meeting should be held at night and be in the open air; that the circulars which Spies was preparing were to be printed "for distribution at the mass-meeting;" that the Hay-market meeting held Tuesday night was the meeting talked about and agreed upon on that Monday afternoon.

Grueneburg says that he saw Fischer in the compositors' room of the Arbeiter Zeitung as late as 5:30 o'clock on Monday evening, and when it is remembered that Fischer went to the meeting at Greif's Hall that night and induced the armed men to agree to the holding of an open-air meeting on Tuesday night at the Hay-market, and himself printed and caused to be circulated a hand-bill calling on the workmen to come armed to that meeting, and when it is further remembered that the signal word "Ruhe," which the armed men that night agreed upon at his suggestion, was next day written by Spies

with his own hand and published in the Arbeiter Zeitung on Tuesday afternoon, the jury certainly had reasonable ground for believing that the action of Fischer on Monday night was taken in consequence of and pursuant to the arrangement decided upon between Spies, Schwab and others at the Arbeiter Zeitung office Monday afternoon.

This conclusion receives confirmation from the character of the articles which appeared in the Arbeiter Zeitung on Tuesday afternoon. The following editorial published on May 4, 1886, and called the "To Arms" editorial, was written by the defendant Schwab:

"Blood has flowed. It happened as it had to. Order has not drilled and disciplined her murdering hounds in vain. The militia has not been drilled in street-fighting for mere sport. The robbers, who know best themselves what a mean rabble they are, who keep up their mammon by rendering the masses wretched; who make the slow murdering of laboring men's families their vocation, they are the last to be afraid of directly butchering the laboring men. 'Down with the rabble' is their watch-word. Is it not an historical fact that private property has had its origin in acts of violence of all sorts? And shall the 'rabble,' the laboring men, allow this capitalistic pack of robbers to carry on, through hired assassins, their bloody orgies? Nevermore! The war of classes has come. In front of McCormick's factory workmen were shot down yesterday whose blood cries for vengeance. Who will any longer deny that the ruling tigers are thirsting for the workman's blood? Countless victims have been slaughtered upon the altars of the golden calf amidst the triumphant shouts of the capitalistic band of robbers. One has only to think of Cleveland, New York, Brooklyn, East St. Louis, Fort Worth, Chicago, and countless other places, in order to recognize the tactics of the extortioners. It is 'terror to our working cattle;' but the laborers are not sheep, and the white terror will be answered with the *red*. Do you know what that means? Very well, you will find that out yet.

"Modesty is a vice of the workingman, and can there be anything more modest than this eight-hour demand? Peaceably the workmen made it already a year ago, in order not to neglect to give the extortioner opportunity to prepare for it;

and the answer to this was to drill the police force and the militia and to browbeat the laborers who worked in favor of the eight-hour system. And yesterday blood flowed.

"This is the manner in which these devils reply to a modest petition of their slaves. Death, rather than a life of wretchedness! If workmen must be shot at, well, then, let us answer them in a manner which the robbers will not soon forget again. The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle, eager for murder; impatiently he whips his tail and the sinews of his clutches are drawn tight. Self-defense causes the cry "To arms!" "To arms!" If you do not defend yourselves you will be torn to pieces and ground by the animal's teeth. The new yoke which awaits you in case of cowardly retreat is heavier still and harder than the severe yoke of slavery as it exists now.

"All the powers, hostile to the workmen, have been [made] common cause. They recognize their common interest. They have the necessary class-consciousness. In such days as ours are, everything else must be subordinated to this one thought: How can the thieving —, together with their gangs of hired murderers, be made harmless?

"The whole newspaper gang makes up the lie to-day that the strikers who were in the neighborhood of McCormick's factory yesterday were the first to fire. That is a bold barefaced lie on the part of the journalistic ragamuffins. Without any warning whatever they fired at the workmen, when they of course returned the fire; indeed, why should they make so much ado about the rabble? To be sure, if they had been sheep or cattle, instead of human beings, one might have reflected a little before shooting; but as it was, a laboring man is quickly replaced, and the gluttons then at their rich dinners and in the circles of their mistresses boast of the splendid achievements of law and order. In the poor shanty, miserably clad women and children are weeping for husband and father. In the palace they touch glasses filled with costly wine and drink to the happiness of the bloody bandits of law and order. Dry your tears, ye poor and wretched; take heart, ye slaves; arise in your might and overthrow the system of robbery, present order based on robbery."

The following is a portion of the article already quoted from, which was written by the defendant Spies, and published in the *Arbeiter Zeitung* on Tuesday, May 4, 1886:

"Six months ago, when the eight-hour movement began, there were speakers and journals of the I. A. A. who proclaimed and wrote: 'Workmen, if you want to see the eight-hour system introduced, arm yourselves. If you do not do this, you will be sent home with bloody heads, and birds will sing May songs upon your graves.' ('That is nonsense' was the reply.) 'If the workmen are organized they will gain the eight hours in their Sunday clothes.' What do you say now? Were we right or wrong? Would the occurrence of yesterday have been possible if our advice had been followed? Wage-workers, yesterday the police of this city murdered at the McCormick factory, so far as it can now be ascertained, four of your brothers, and wounded, more or less seriously, some twenty-five more. If brothers who defended themselves with stones (a few of them had little snappers in the shape of revolvers) had been provided with good weapons and one single dynamite bomb, not one of the murderers would have escaped his well-merited fate. As it was, only four of them were disfigured. That is too bad. The massacre of yesterday took place in order to fill the forty thousand workmen of this city with fear and terror—took place in order to force back into the yoke of slavery the laborers who had become dissatisfied and mutinous. Will they succeed in this? . . . About seventy-five well-fed, large and strong murderers, under the command of a fat police lieutenant, were marching toward the factory, and on their heels followed three patrol-wagons besides, full of law-and-order beasts. Two hundred policemen were on the spot in less than ten or fifteen minutes, and the firing on fleeing workingmen and women resembled a promiscuous bush-hunt. . . . A few of the strikers had little snappers of revolvers, and with these returned the fire; . . . with their weapons, mainly stones, the people fought with admirable bravery. They laid out half a dozen blue-coats, and their round bellies, developed to extreme fatness in idleness and luxury, tumbled about, groaning on the ground. Four of the fellows are said to be very dangerously wounded; many others, alas! escaped with lighter injuries. (The gang, of course, con-

ceals this, just as in '77 they carefully concealed the number of those who were made to bite the dust.) But it looked worse on the side of the defenseless women. Dozens who had received slight shot wounds hastened away amid the bullets which were sent after them. The gang, as always, fired upon the fleeing, while women and men carried away the severely wounded. How many were really injured and how many were mortally wounded could not be determined with certainty, but we think we are not mistaken when we place the number of mortally wounded at about six and those slightly injured at two dozen. We know of four, one of whom was shot in the spleen, another in the forehead, another in the breast, and another in the thigh. A dying boy, Joseph Doedick, was brought home on an express wagon by two policemen."

Also in the issue of the *Arbeiter Zeitung* of Tuesday, May 4, 1886, appeared the following:

"An outbreak was expected on the Southwest side this morning. A regiment of militia and the whole municipal gang of murderers were held in readiness. Just stir, ye free workmen of America, if you want to be shot down."

In the same issue of the *Arbeiter Zeitung* of May 4, 1886, also appeared the following:

"The heroes of the club dispersed with their cudgels yesterday in the most brutal manner a crowd of girls, many of whom had scarcely outgrown their baby shoes. Whose blood does not rush quicker through the veins when he hears of this atrocity of the minions of the law? He who is a man, show it these days. Men, to the front!" "The armory on Lake Michigan is guarded by militia tramps. The youngsters say they are fully equipped. Should the anarchists venture an attack from any point, they would find a warm reception. Well, as long as the youngsters are in their barracks, they will probably not be molested. But if they appear on the streets, circumstances might be altered."

The *Alarm* and *Arbeiter Zeitung* were more than mere newspapers to the members of the International Association. They were the organs of that association. The members looked to those papers for orders and directions. More especially was this the case with the *Arbeiter Zeitung* and its German readers. The record contains many evidences of this fact.

The seventy or eighty armed men who assembled in the basement of Greif's Hall, and their absent confederates, who were to be informed of their conspiracy, were to look for the word "Ruhe" in the Arbeiter Zeitung. From that word the members were to learn when the social revolution had come and when they were to assemble for conflict. This showed that they were in the habit of reading that paper and consulting it. When a special meeting of the armed sections was desired, they who belonged to those sections found the signal words calling them together, in the Arbeiter Zeitung. This implied that they were readers of that paper. The seventy or eighty men just referred to went to Greif's Hall because they saw the summons to go there in their organ. Some of them testify that they went there for that reason, and there is no evidence that they received any other notice of the Monday night meeting than the one published in the Arbeiter Zeitung. The assemblage of seventy or eighty of them there may be regarded as proof that seventy or eighty of them read the paper in question on Sunday or Monday.

Many witnesses in this case, both for the state and for the defense, who testify to their membership in the International Association, testify also to the fact that they were in the habit of reading one or the other of the two organs here referred to.

Waller, a member of the Lehr und Wehr Verein, who presided at the gathering in the basement of Greif's Hall, and who was armed with a revolver at the Hay-market on Tuesday night, says that he saw the word "Ruhe" in the Arbeiter Zeitung at 6 o'clock Tuesday afternoon in a saloon on Milwaukee avenue, and that on Monday he saw the words "Y Komme Montag Abende" in the same paper.

When Lingg desired to explain to Seliger the disturbance that was expected on the West side, he went to the Arbeiter Zeitung and showed the word "Ruhe."

Without going further into the testimony, we think the jury were warranted in believing that most of the editorials in those papers, which were generally in the form of appeals or addresses to the workingmen, were read at least by those of the workingmen who belonged to the groups herein mentioned. More especially were those organs consulted during the excitement of the eight-hour movement, when information as to the

progress of that movement was eagerly sought after among the classes affected by it.

As already stated, the weight of the evidence is in favor of the conclusion that Degan was killed by some member of the International Association. It was for the jury to say how far that fatal result may have been brought about through the influence of the utterances put forth by the organs here designated.

As late as Tuesday afternoon Spies said to the workingmen, in an editorial in his paper, proven to have been written by himself: "Then do not delay a moment; then, people, to arms! Annihilation to the beasts in human form who call themselves rulers!"

As late as Tuesday afternoon Schwab said to the workingmen, in an editorial in the same paper, proven to have been written by himself: "The murderous capitalistic beats have become drunk with the smoking blood of laborers. The tiger lies ready for the jump; his eyes sparkle, eager for murder; impatiently he whips his tail, and the sinews of his clutches are drawn tight. Self-defense causes the cry: 'To arms! To arms!' If you do not defend yourselves you will be torn in pieces and ground by the animal's teeth."

"He who inflames people's minds, and induces them by violent means to accomplish an illegal object, is himself a rioter, though he takes no part in the riot." *Reg. v. Sharpe*, 3 Cox, C. C., 288.

"One is responsible for what wrong flows directly from his corrupt intentions; . . . if he set in motion the physical power of another, he is liable for its result. If he contemplated the result, he is answerable, though it is produced in a manner he did not contemplate. . . . If he awoke into action an indiscriminate power he is responsible. If he gave directions vaguely and incautiously, and the person receiving them acted according to what he might have foreseen would be the understanding, he is responsible." 1 Bishop, C. L., sec. 641.

We conceive that it can make no difference whether the mind is affected by inflammatory words addressed to the reader through the newspaper organ of a society to which he belongs, or to the hearer through the spoken words of an orator, whom he looks up to as a representative of his own peculiar class. *Queen v. Most*, L. R., 7 Q. B. D., 244.

It was a question for the jury whether, with the evidence before them, the attack upon the police at the Hay-market "was so connected with the inflammatory language used that they cannot be separated by time or other circumstances."

We do not wish to be understood as deciding that the influence of these publications in bringing about the crime at the Hay-market could be considered by the jury if they were the *only* evidence of encouragement of that crime which was furnished by the record. We only hold that the jury were at liberty to consider the publications in question in connection with all other facts and circumstances of this particular case, and as a part of those facts and circumstances, with a view of determining whether the defendants who were responsible for their issuance did or did not belong to the conspiracy now under consideration.

It has already been stated that the defendant Schwab was present at the Hay-market a part of Tuesday evening, but left and went to Deering, where he made a speech. What was said in that speech is not disclosed by the record. The proof shows that those who called the Hay-market meeting expected an attendance of twenty-five thousand workingmen at that place. As matter of fact only about two thousand came. Several thousand had assembled at Deering. That Schwab went to Deering and there addressed some of the workingmen who were expected at the Hay-market but failed to come would in no wise lessen his responsibility for the death of Degan, if by his acts and declarations, as heretofore and hereafter noticed, he helped to cause that death. If he belonged to the same conspiracy with Degan's murderer, and the murder of Degan was perpetrated in furtherance of that conspiracy, then the act of the murderer was his act. It is to be noted that he did not go to Deering until he first went to the Hay-market and had a consultation with one or more of the leaders who had control of the matters at the latter place. But a further consideration of that branch of the case will be postponed for the present.

Spies spoke to the crowd at the Hay-market.

One of the witnesses says that, in his speech, he dwelt upon the occurrences of Monday afternoon at the lumber shovers' meeting and the part he took in them, and then "advised the using of violent means by the workingmen to right their wrongs; that law and government were the tools of the

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The following is another portion of his speech as testified to by a witness who heard it: "The fight is going on; now is the chance to strike for the existence of the oppressed classes. The oppressors want us to be content; they will kill us. The thought of liberty which inspired your sires to fight for their freedom ought to animate you to-day. The day is not far distant when we will resort to hanging these men. [Applause, and cries of 'hang them now.'] — — is the man who created the row Monday, and he must be held responsible for the murder of our brothers. [Cries of 'hang him.'] Don't make any threats; they are of no avail; whenever you get ready to do something, do it, and don't make any threats beforehand. There are in the city to-day between forty and fifty thousand men locked out because they refuse to obey the supreme will or dictation of a small number of men. The families of twenty-five or thirty thousand men are starving because their husbands and fathers are not men enough to withstand and resist the dictation of a few thieves on a grand scale to put out of the power of a few men to say whether they should work or not. Would they place their lives, their happiness, everything out of the arbitrary power of a few rascals? To say whether you shall work or not, you place your lives, your happiness, everything out of the arbitrary power of a few rascals who have been raised in idleness and luxury upon the fruits of your labor. Will you stand that?"

Still another witness says "he talked about the police, the blood-hounds of the law, shooting down six of their brothers, and he said, 'when you get ready to do something, do it, and don't tell anybody you are going to.' . . . At the time Mr. Spies was showing them how the officers came down the 'Black Road' and commenced shooting into the crowd of workingmen; . . . they appeared very much excited in the neighborhood of the wagon and in the neighborhood, where they hallooed out 'let us hang them!'"

The observations hereafter made in regard to the speech of the defendant Parsons and its effect apply also to this speech of the defendant Spies.

The evidence thus far commented upon in reference to the acts and declarations of the defendants Spies and Schwab is such that the jury were warranted in finding them to be parties to the conspiracy. In addition, however, to the facts and circumstances already noticed, there was other testimony introduced by the state for the purpose of proving that the defendants Spies and Schwab, either one or both of them, gave the bomb that killed Degan into the hands of the person who threw it, and aided him in his murderous design.

Malvern M. Thompson testifies that he saw Spies and Schwab together in Crane's alley on the night of the Hay-market meeting and heard the words "police" and "pistols" uttered in a conversation between them; that Spies said to Schwab: "Do you think one is enough or hadn't we better go and get more?" That they came out of the alley and walked together west on Randolph street to the southwest corner of Randolph and Halstead streets, where they entered the thickest of a crowd of about twenty-five men, remaining there some three minutes and then returning to Desplaines street; that, on the way back, the word "police" was again used, and Schwab said to Spies: "Now, if they come we will give it to them;" that, upon their return, Rudolph Schnaubelt met them on the sidewalk near the wagon and Spies handed Schnaubelt something which the latter put in his pocket on the right hand side; that Spies then mounted the wagon and began to speak; that after him Schnaubelt also mounted the wagon, and sat down with his hands in his pockets until Fielden began to speak, when the witness left.

The witness did not know what it was that was handed to Schnaubelt, but, upon the assumption that he tells the truth, it was evidently something that was to be used against a body of policemen, and as a bomb with a projecting fuse is made to be thrown into a crowd of men, the jury, looking at the circumstance here noted in the light of the other facts and circumstances developed by the testimony in the case, were warranted in believing that the thing given to Schnaubelt was a bomb. Therefore the evidence of Thompson, if true, tends very strongly to convict Spies and Schwab of aiding and abetting the crime of the Hay-market.

Schwab testifies that while he was in the Arbeiter Zeitung

office on that evening, a call came through the telephone for a speaker to address the meeting at Deering, and that he at once went over to the Hay-market to consult with Spies about it; that he failed to find Spies and did not see him or talk with him at all; that he met Schnaubelt, his brother-in-law, and after talking with him about sending a speaker to Deering, concluded to go himself; that he thereupon took a Randolph street car and went east to the court-house, there boarding a Clybourne avenue car for the north.

The testimony in regard to the matters about which Thompson testifies is very conflicting. There is much that tends to confirm him, and much that tends to contradict him.

First. As to the proof tending to confirm Thompson.

It is established beyond question that Schwab went to the Hay-market for the express purpose of seeing Spies; that Schnaubelt was at the Hay-market until after 10 o'clock, and was on the wagon with Spies, Parsons and Fielden; that Spies *did* walk in company with *somebody* from the wagon westward on Randolph street for the avowed purpose of finding Parsons, who had been seen before 8 o'clock at the corner of Randolph and Halstead streets, and *did* return along Randolph street to the wagon, in company with the same person who started with him.

The statements of Owen and Heineman, and of Spies and Schwab themselves, when analyzed and compared, show that Schwab was at the Hay-market that evening for at least half an hour, and that Spies was there at the same time.

Other testimony shows that Schnaubelt was there at the same time.

Thompson is confirmed in many particulars. He says that "Schwab came rushing along Desplaines street in a great hurry." Owen also says: "Schwab came up and almost run into the mayor before he saw him."

Thompson says that just after seeing Schwab he crossed to the east side of Desplaines street, went north towards Lake, then returned southward, saw Spies get on the wagon and heard him ask if Parsons was present; then while he was standing at the entrance to the alley, saw Spies, after his descent from the wagon, go with Schwab for a few moments

into the alley, etc. Owen says that when Schwab saw the mayor at the corner of Desplaines and Randolph streets, he "immediately upon that turned about and went north on Desplaines street." It thus appears that Schwab was seen going in the direction of the alley, where Thompson claims to have seen the meeting between him and Spies, and about the time when that meeting is claimed to have been witnessed. Schwab says himself "that he went across Randolph street, and north of Randolph on Desplaines I met my brother-in-law, Rudolph Schnaubelt."

Cosgrove says: "I saw Mr. Schwab there before the meeting began. I seen him there just after the time Mr. Spies returned. . . . The first time I saw him was about forty feet south of Randolph on Desplaines street, on the west side of the street. The last time I saw him was at the wagon—it was about half past 8."

McKeough says: "I saw Schwab on the wagon in the early part of the evening and a man named Schnaubelt. . . . Spies started away then and officer Myers and I followed him as far as the corner. There was a man with him, who I think was Schwab. I saw Schwab there in the early part of the evening. I lost sight of him finally somewhere in the vicinity of half past 8 o'clock. After that I did not see him at all during the entire evening. . . . He got on the wagon, I think, before the meeting started, and tapped Mr. Spies on the shoulder and said something to him. *I saw him at the side of the wagon talking to Spies.*"

Freeman, a reporter, also says that he thought he saw Schwab on the wagon.

The person who thus spoke to Spies, and who was Schwab, according to McKeough's evidence, is said by Spies to have been one Schroeder. Spies also says that the man who started away with him him to the corner of Desplaines and Randolph streets was Schnaubelt. As McKeough speaks of seeing Schnaubelt on the wagon, he must have known him, and he does not refer to Schnaubelt as being with Spies when the latter went off to the west.

The south end of the wagon was only a few feet from the alley, and if Schwab and Spies did step into the alley and ut-

ter the few words, which Thompson claims to have heard, it could all have been done in a few seconds before they started towards Randolph street.

The utterance of the words "pistols" and "police" at that time and under those circumstances was natural, as Schwab had just passed the Desplaines street station, and he must have seen what Sahl, one of the witnesses for the defense, says that he saw at about a quarter before 8 o'clock, namely, "three patrol-wagons manned with police, and about one hundred to one hundred and fifty men drawn up in the rear of the patrol-wagons on Waldo Place." That this created such an excitement among those interested in the Hay-market meeting as would have given rise to the expressions which Thompson claims to have heard is manifest from the language used by Spies and Parsons in their speeches.

The conversation between Spies and Schwab, as sworn to by Thompson, would indicate a knowledge of the place where bombs were to be had. Schwab belonged to the North side group, engaged in arming for May 1st, to which Seliger and Lingg belonged. Seliger, one of the bomb-makers, was a member of the central or general committee, which held its meetings every two weeks in the library room in the rear of Schwab's office at the Arbeiter Zeitung building. Schwab says that he started from his house, No. 51 Florimond street, to his office on Tuesday night at twenty minutes before 8. At that time Lingg and Seliger were preparing to leave 442 Sedgwick street to take the bombs to Neff's Hall.

The remark, "*Now, we will give it to them,*" would imply that, if Spies and Schwab gave Schnaubelt a bomb, they obtained it from someone among the twenty-five men into whose midst they went at the corner of Halstead and Randolph streets. The most direct route to the Hay-market from No. 58 Clybourne avenue is south on Larrabee street to Chicago avenue, west on Chicago avenue to Halstead street, south on Halstead to Randolph street. It is proven in this record that on Tuesday night a patrol-wagon went from the corner of North avenue and Larrabee street, a point considerably north of No. 58 Clybourne avenue, to the Hay-market in eight minutes by the route here indicated. From the precautions which the record shows to have been necessary in the handling of these bombs, they could not have been handled safely and com-

fortably on a street car without attracting attention. If they had been brought in a wagon of any kind or by a person on foot from Neff's Hall to the Hay-market along the route traveled by the patrol-wagon, one of the corners of Halstead and Randolph streets would have been a very natural place to look for them. There is evidence in the record tending to show that several of Lingg's assistants in the matter of making bombs were at the Hay-market meeting.

Second. As to the proof tending to contradict Thompson.

Spies and Schwab both swear that they not only did not talk together or walk together at the Hay-market meeting, but that they did not see each other on that evening.

Henry W. Spies also contradicts Thompson, but we regard his evidence as seriously weakened by his cross-examination.

He testifies upon his direct examination as follows:

"While the speaking was going on I was standing alongside of the wagon; . . . stood there during the entire meeting; . . . saw Fielden getting off at the back of the wagon. I told my brother (August Spies the defendant) to get off, and reached my hand over to him to help him jump. He took my hand. . . . Just at that time the explosion took place. . . . As he jumped, somebody jumped behind him with a weapon right by his back, and I grabbed it, and, in warding off the pistol from my brother, I was shot." On his cross-examination he says: "On the 10th of May I was arrested at my house by Officers Whalen and Lowenstein. I told them that, when the bomb exploded, I was at Zepf's Hall, walked out and was shot in the door. I told them that I was not at the Hay-market from beginning to end. That was not true when I told it to them. I lied to them. . . . I also said that I did not see my brother that evening until he called at the house and asked me if I had a good physician. I now state what I then said about that was not the truth."

Richter says that he was standing at about the middle of the mouth of the alley, and saw Spies on the wagon when he asked "Is Parsons here?" but did not see him go into the alley after he descended from the wagon. He says, however, that he did not notice on which side of the wagon Spies alighted, nor in what direction he went after leaving the wagon.

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So with Liebel. He says that he did not see Spies enter the alley; but he also says that he did not see in what direction or where Spies went after he left the wagon.

Sahl's testimony tends more strongly to contradict Thompson than that of the other witnesses. He says that he knew Spies and Schwab and had heard them speak at Greiff's Hall and Zepf's Hall; that he saw Spies mount the wagon and heard him ask for Parsons; that Spies, after he came down from the wagon, passed witness in company with two or three other persons, and that Schwab was not one of them. Sahl was at that time in the middle of the street, in a southwesterly direction from the wagon, in the crowd of persons standing there.

Thompson's testimony is positive in its character and he is unimpeached as a witness, while that of the defense upon this subject is for the most part negative in character.

The jury had a right to consider the evidence of Spies and Schwab in the light of the facts that they were both on trial for murder, and that their statements on the stand were inconsistent with and contradictory of previous declarations made by them. Greenl. on Ev., vol. 1, sec. —, note.

The prosecution introduced a witness by the name of Harry L. Gilmer. If the testimony of this witness is true, there is no doubt but that the defendant Spies is guilty of the murder of Degan. He swears that Spies struck a match and lighted the fuse of a bomb in the hand of Rudolph Schnaubelt, and that Schnaubelt at once, as soon as Spies had applied the match, threw the bomb into the midst of the police. Gilmer says that he came to the Hay-market meeting at about a quarter before 10 o'clock; that he had been on the South side, and was going to his home on the West side and stopped at the meeting on his way; that he went up from Randolph street on the East side of Desplaines while Fielden was speaking, and stood between the lamp-post on the southeast corner of the alley and Desplaines street and the wagon, near the east end of the wagon; that he stepped back into the alley on the north side thereof and noticed some parties opposite him on the south side of the alley, who were talking in German, and whose con-

versation he did not understand; that he heard some one on the edge of the sidewalk say, "Here come the police," and then there was a rush as if to see the police as they were coming up; that a man came from the wagon to the parties on the south side of the alley, and "lit a match and touched it off, something or other; the fuse commenced to fizzle and he gave a couple of steps forward, and tossed it over into the street; . . . the man that lit the match came on this side of him and the two or three stood together, and he turned around with it in his hand," etc. The witness stated that he did not know the name of the man who threw the bomb, but knew him by sight, as he had seen him several times at meetings at different places in the city. When shown a photograph of Schnaubolt, he said: "I say that is the man that threw the bomb out of the alley." When asked who the man was that came from the wagon towards the group referred to and lighted the match, he pointed to the defendant Spies and said: "that is the man right there." The defense have proven that a match was lighted in the alley at this time, but claim that it was struck by a laborer in order to light his pipe.

The defense introduced nine witnesses living in Chicago for the purpose of impeaching Gilmer. The prosecution introduced eight witnesses from Iowa, where Gilmer lived from 1870 to 1879, and ten witnesses from Chicago, where he lived from 1879 to 1886, to sustain his reputation for truth and veracity.

Before a witness can say that he will not believe a man under oath he must first swear that he knows that man's reputation for truth and veracity among his neighbors, and that such reputation is bad. The unwillingness to believe under oath must follow from and be based upon two facts: first, the fact that the witness knows the reputation for truth and veracity among the man's neighbors; second, the fact that such reputation is bad. As the reputation must be bad before it can be known to be bad, the most material fact to be proved is that such reputation is bad.

What a man's reputation is, is a fact to be proved just as any other fact. Where, as here, eighteen witnesses of standing and credibility swear that a man's reputation is good, while nine of equal standing and credibility swear that it is

bad, the jury must determine for themselves whether they will believe the eighteen men or the nine men.

Other testimony introduced to discredit Gilmer was intended to establish, first, that the bomb was not thrown from the point from which Gilmer said it was thrown; second, that Spies was just getting off the wagon when the explosion occurred, and, therefore, could not have been in the alley lighting a match.

A witness by the name of Barnett swore that he saw the bomb thrown, and that the man who threw it stood right in front of him, and threw the bomb towards the northwest. Desplaines street between the sidewalks is forty-eight feet six inches wide. The bomb fell "on the west side of Desplaines street, slightly north from the south line of the alley," extended. The testimony of Barnett does not cast much light upon the subject either as to the person who threw the bomb, or as to the point from which it was thrown. When shown the photograph of Schnaubelt and asked if that was the man who threw the bomb, he says: "I guess not. I never could recognize anybody." He says that the man who threw the bomb had his back turned towards him, and that he could not describe him, and would not know him if he saw him. As to the place where he stood when the bomb was thrown he placed it at one time ten or fifteen feet south of the alley, at another thirty-eight feet south of the alley, at another forty-five feet south of the alley.

The testimony of the witnesses differs very greatly as to the point with reference to the alley from which the bomb ascended into the air before it fell. One witness says it came from a point north of the alley, another that it came from a point five or six feet south of the corner of the alley; others fix the point at various distances south of the alley varying from five to forty-five feet. Witnesses for the defense, identified mostly with the International organization, and from whose midst the shots fired at the police must have come, place the point from which the bomb was thrown at the greatest distance south of the point where Gilmer fixes it.

Heineman, the reporter, a witness whose testimony is favorably quoted by both sides, says that he was forty-five feet south of the alley, on the east sidewalk of Desplaines street,

when the bomb exploded, and that he saw the bomb or the burning fuse rise out of the crowd from "very nearly the southeast corner of the alley" and "fall among the police." This is just about the place from which Gilmer says that it ascended.

When the police halted and the captain gave the order to disperse, they were very near the south end of the wagon. The main body was on a line with the mouth of the alley, which was eleven feet wide. Bonfield says "the front rank of the first division was near up to the north line of the alley." All the police faced towards the north and were standing in regular fixed lines. Several of the officers describe the course of the bomb through the air, as seen by them from their position in the ranks. It could not have been seen by them in the manner indicated in their testimony if it had started from a point as far south as that sworn to by Barnett and some of the other witnesses for the defense.

The defense introduced a number of witnesses, more or less identified with the defendants in their conspiracy against the police and who stood around the wagon during the evening, for the purpose of showing that Spies did not go into the alley just before the explosion. The testimony is negative in its character. It may have been true that Spies did go into the mouth of the alley, as Gilmer says, and yet it may be true that most of the witnesses, whose attention was naturally directed toward the approaching columns of the police, may not have seen him enter the alley. The defendant Spies swears that, when the order to disperse was given, he was still on the wagon, and that, when he dismounted, the bomb exploded just as he touched the sidewalk. The evidence of other witnesses for the defense tends to confirm this statement. He says that, after the explosion, he was carried northward by the pushing crowd and went into Zepf's Hall, and that he did not go into the alley nor in the direction of the alley. But Bonfield swears that after his arrest Spies claimed to have gone, after the explosion, eastward through Crane's alley and then southward therefrom to Randolph street. Henry Spies inquired for his brother at Zepf's Hall just after the explosion but did not find him there.

To further contradict Gilmer, a witness was examined for

the purpose of showing that Schnaubelt left the Hay-market before the bomb was exploded. This witness was August Krueger, the orderly sergeant and corresponding secretary of the second company of the Lehr und Wehr Verein. He was present at the Monday night meeting of the armed sections, at which Schnaubelt was also present.

Krueger states that he saw the notice of the Hay-market meeting in the Arbeiter Zeitung, and went there about 9 o'clock and remained until 10 o'clock; that about 10 o'clock he was standing on the west side of Desplaines street about thirty or forty feet north of Randolph street, when Schnaubelt came towards him from the northeast; that he had seen Schnaubelt before, but did not know his name; that Schnaubelt proposed to him to go home; that he walked south to Randolph street with Schnaubelt, then eastward to Clinton street, when Schnaubelt proceeded on eastward on Randolph street, while he went north on Clinton street, thence by way of Milwaukee avenue to Engel's house.

If this were all true, Schnaubelt may have returned and entered Crane's alley through its opening into Randolph street. Krueger stated, after he was arrested on May 6th, that he was not at the Hay-market at all on the evening of May 4th, and upon his cross-examination in this case he admits that he so stated.

There is a mass of testimony in the record in reference to the statements made by Thompson and Gilmer. Some of this testimony sustains those statements and some of it discredits them. Any further review of it than that which has already been made will be impossible in this opinion. It is sufficient to say that it is very conflicting. It was the province of the jury to pass upon it. They had the right to consider it in connection with all the other facts and circumstances in the case. It is not necessary for us to pass any opinion upon it, as we think there is evidence enough in the record to sustain the finding of the jury independently of the testimony given by Thompson and Gilmer.

FIELDEN.

On Monday evening the defendant Fielden was making a speech to some wagon-makers on one of the upper floors of the building, No. 54 West Lake street, while the armed sections

were concocting their conspiracy in the basement of that building. The proof does not show, however, that he was present at the meeting in the basement, or took part in the original formation of the Monday night conspiracy.

A conspiracy may be described in general terms as a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. 3 Greenleaf on Ev., sec. 89; *Heaps v. Dunham*, 95 Ill., 583. It is not necessary, however, that the accused should have been an original contriver of the mischief, "for he may become a partaker in it by joining the others while it is being executed." 2 Bishop's Criminal Law, 190.

If he concur, no proof of agreement to concur is necessary. . . . As soon as the union of wills for the unlawful purpose is perfected, the offense of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from the other facts proved; in other words, by circumstantial evidence. 2 Bishop on Criminal Law, 190 and note 7.

Are there such facts and circumstances proven in this case as would warrant a jury in finding that the defendant Fielden became a partaker in the conspiracy planned on Monday night by joining those who were engaged in its execution on Tuesday night?

He says that he had an engagement to make a speech Tuesday night on West Twelfth street, but that he saw in an English evening paper a call to the members of the American group to meet at No. 107 Fifth avenue on important business; that, as he was the treasurer of that group and had its funds in his hands, he canceled his engagement and went to the meeting so called, arriving at ten minutes before 8. It was held in the office of the Arbeiter Zeitung newspaper and has already been referred to.

Between 8 and 9 o'clock he left the Arbeiter Zeitung building and went over, in company with Parsons and other members of the "International Rifles," to the Hay-market. After the crowd there had been addressed by Spies and Parsons, the defendant Fielden made a speech from the wagon, some of which was as follows:

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say the anarchists will sneak away; we are not going to. If we continue to be robbed, it will not be long before we will be murdered. There is no security for the working classes under the present social system. A few individuals control the means of living and are holding the workingmen in a vise. Everybody does not know. Those who know it are tired of it, and know the others will get tired of it, too. They are determined to end it and will end it, too, and there is no power in the land that will prevent them. Congressman Foran said: 'The laborer can get nothing from legislation.' He also said that the laborers can get some relief from their present condition when the rich man knew it was unsafe for him to live in a community where there were dissatisfied workingmen, for they would solve the labor problem. *'I don't know whether you are democrats or republicans, but whichever you are, you worship at the shrine of rebels. John Brown, Jefferson, Washington, Patrick Henry and Hopkins said to the people: The law is your enemy.'* We are rebels against it. The law is only framed for those that are your enslavers. (A voice: 'That is true.') Men in their blind rage attacked McCormick's factory and were shot down *by the law, in cold blood, in the city of Chicago, in the protection of property.* Those men were going to do some damage to a certain person's interest, who was a large property-owner, therefore the law came to his defense. And when McCormick undertook to do some injury to the interest of those who had no property, the law also came to his defense and not to the workingman's defense, when he (Mr. McCormick) attacked him and his living. (Cries of 'No.') There is the difference. The law makes no distinctions. A million men own all the property in this country. The law has no use for the other fifty-four millions. (A voice, 'Right enough.') *You have nothing more to do with the law except to lay hands on it and throttle it until it makes its last kick. It turns your brothers out on the wayside, and has degraded them until they have lost the last vestige of humanity, and they are mere things and animals. Keep your eye upon it. Throttle it. Kill it. Slab it. Do everything you can to wound—to impede its progress. Remember, before trusting them to do anything for yourself, prepare to do it for yourself. Don't turn over your business to anybody else. No man deserves anything unless he is man enough to make an effort to lift himself from oppression.*

"Is it not a fact that we have no choice as to our existence, for we can't dictate what our labor is worth? He that has to obey the will of any is a slave. *Can we do anything except by the strong arm of resistance? Socialists are not going to declare war, but I tell you war has been declared upon us, and I ask you to get hold of anything that will help to resist the onslaught of the enemy and the usurper. The skirmish lines have met. People have been shot. Men, women and children have not been spared by the capitalists and minions of private capital. It had no mercy on you. You are called upon to defend yourselves, your lives, your future. What matters it whether you kill yourselves with work to get a little relief, or die on the battlefield resisting the enemy? What is the difference? Any animal, however loathsome, will resist when stepped upon. Are men less than snails or worms? I have some resistance in me. I know that you have too. You have been robbed and you will be starved into a worse condition.*"

At this point the policemen appeared and ordered the meeting to disperse, as has already been stated. Witnesses for the state swear that, when the policemen were approaching the alley, either Fielden, or some one with him on or near the wagon, used the following language: "Here come the blood-hounds; do your duty, men, and I'll do mine." Witnesses for the defense swear that no such words were spoken. Whether one set of witnesses or the other told the truth upon this subject was a matter for the jury to decide.

There is evidence of a very distinct and positive character that Fielden shot at the police.

Lieutenant Martin Quinn says: "There was a shot fired from the wagon by the man that was speaking at that time. . . . It is Mr. Fielden here. . . . He made the remark 'We are peaceable' just as he was going down off of the wagon onto the sidewalk; . . . and just as he was going down he fired right where the inspector was and Captain Ward and Lieutenant Steele," etc.

Officer Krueger says: "He (Fielden) stood at the south end of the wagon; . . . he stepped down from the wagon and passed right to my right behind the wagon, and in about a moment the bomb fell behind me. Then I saw a pistol in his hand and it exploded twice. I am certain of the two shots being fired by that gentleman (Fielden). I stood within about six or

eight feet of the wagon, on the street side of it. He (Fielden) passed right past me; I could almost have touched him with my hand, and he went right behind the wagon and stepped upon the sidewalk when the bomb exploded. *Then I saw him have a pistol in his hand, and he fired twice to my recollection; . . .* he took cover behind the wagon; he covered himself with the wagon between the police and him; I then returned his fire, and at the same instant *I received a bullet in my kneecap; he fired directly at the column of the police, and he fired two shots from there; he stooped down behind the wagon.*"

L. C. Baumann, a policeman of Lieutenant Steele's company, says: "I was standing north of that alley there. I should judge about three or four feet from the wagon. . . . *I saw Mr. Fielden, that he was standing on the hind wheel, behind the hind wheel of the wagon, and had a revolver in his hand and fired off a shot; he was standing on the sidewalk right behind the hind wheel; he shot from east to west; that was after the explosion of the bomb, I should say about half a minute.*"

Officer Hanley says: "At the time the bomb exploded I was about four or five feet from the wagon; I was facing north; I noticed the man that was the last speaker; immediately after the bomb exploded I turned my face from (to) where the explosion was and I looked for the wagon again, and I noticed that man right over there (referring to defendant Fielden) *by the wheels of the wagon, with a revolver, right behind, firing. I saw one shot go, then I thought it was time to draw my revolver, and, just as I got my revolver out, they rushed for the alley that was a little south of the wagon. Q. Who rushed into the alley? A. Well, him (Fielden) and about, I really should judge, about twenty more; they kept firing about fifteen or twenty shots after they started to run in the alley.*"

Officer Spierling says: "I was facing north when the bomb exploded; I was about ten or twelve feet from that wagon at that time. *I saw Mr. Fielden get off of the wagon and fire one shot; he was standing behind the wagon on the sidewalk.*"

John Wessler, a policeman in Lieut. Bowler's company, testified: "The wagon stood next to the curb, lengthwise, and at the middle of the south end of the wagon, *Mr. Fielden stood there, and I noticed before I got there a man who would not stand up, and he would shoot into the police and get down behind*

the wheel, . . . and I went and saw that Mr. Fielden was there, and he got up a second time and shot into the police."

Fielden swears that he not only fired no shots on Tuesday evening, but that *he had no revolver and never carried one in his life*. It was for the jury to determine whether he told the truth or not. They had a right to consider that he was on trial for murder, and that for more than a year prior to the Hay-market meeting he had not only been urging others to arm themselves, but himself belonged to the *armed* section of the American group, otherwise known as the International Rifles.

Besides Fielden, six witnesses were produced by the defense who swore that they did not see any shots fired by Fielden.

If there was a bias against the defendant Fielden on the part of the policemen testifying for the state, there was just as much of a bias in his favor on the part of those testifying for the defense. Here is a conflict of testimony. Six men swear that they saw pistol shots fired by the defendant Fielden; six other men swear that they did not see such shots fired. The jury saw the witnesses and heard them testify and marked their manner and bearing on the stand. It was their special province to determine whether the witnesses for the accused or for the people told the truth.

It is true that Degan was killed by the bomb that was thrown and not by the shots that were fired. But the attack at the Hay-market was a joint attack made by a number of persons with two different kinds of weapons in pursuance of a previously arranged conspiracy. When Fielden lent himself to the execution of that conspiracy by participating in the joint attack, he was just as guilty of the murder of Degan by reason of firing his pistol as though he had thrown the bomb.

If the man who threw the bomb, and the twenty men whom Officer Hanley saw running into the alley, had stood up together and one had thrown his bomb and the others had fired their shots all at the same time into the ranks of the police, and one of the policemen had at once fallen dead, would not each of the twenty have been as responsible as the bomb-thrower for the death of the man killed, whether such death was caused by the bomb or by the shots?

All had the murderous intent. All were using deadly weapons in pursuance of a common design to destroy life.

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The conduct of Fielden at the Hay-market, considered in connection with his acts prior thereto, and with all the other facts as herein set forth, certainly warranted the jury in finding that he was one of the conspirators.

PARSONS.

What are the facts in regard to the connection of the defendant Parsons with the Hay-market meeting?

The call to the American group to meet at half past 7 o'clock at the Arbeiter Zeitung office on Tuesday evening was published by the defendant Parsons. The notice which has already been referred to was inserted by him in the Evening News, and the original manuscript from which it was printed was in his handwriting. He was seen by several witnesses at the Hay-market, on the corner of Randolph and Halstead streets, before 8 o'clock, and before he appeared at the gathering of the group he had called together at 107 Fifth avenue. From the latter place he went in company with Fielden, Snyder and others to the speakers' wagon on Desplaines street and made a speech to the crowd there gathered. The witness Allen, who heard his speech, says:

"About the only thing that I could quote exact was that at one time he said. 'What good are these strikes going to do? Do you think that anything will be accomplished by them? Do you think the workingmen are going to gain their point? No, No, they will not. The result of them will be that you will have to go back to work for less money than you are getting.' That is his language, in effect. . . . At one time he mentioned the name of Jay Gould; there were cries from the crowd: 'Hang Jay Gould; throw him into the lake,' and so on. He said: 'No, No, that would not do any good. If you would hang Jay Gould now, there would be another, and perhaps a hundred, up to-morrow. It don't do any good to hang one man. You have to kill them all, or get rid of them all.' Then he went on to say that it was not the individual always, but the system; that the government should be destroyed. It was the wrong government, and these people who supported it had to be destroyed *en masse*.

"The temper of the crowd was extremely turbulent, especially after that speech he made about the workingmen not gaining

anything by the strike. . . . The crowd seemed to me to be thoroughly in sympathy with the speaker, and applauded almost every utterance."

Tuttle says: "The crowd that was enthusiastic was near the wagon or around it, and some were on the north side of the wagon. The same parties who had spoken when he referred to Gould, I think the same, one of them anyway, because I had my eye on him for two or three minutes, two minutes, I should say — I think I could describe the man, and would know if I saw him — he stuck up his hand like that (illustrating), with a revolver in it, and said: 'We will shoot the devils,' or some such expression. And I saw two others sticking up their hands near to him, who made similar expressions, and had what I took to be at that time revolvers; but this one man I speak of, I took particular notice of him, and remember his appearance, and saw his revolver very plainly in his right hand; and he grasped it about the center of the weapon and stuck it up in front of the speaker."

Cosgrove says: "That Parsons talked of the police and capitalists and militia and Pinkertons. He says he was down in the Hocking Valley region, and said they were only getting twenty-four cents a day, and that was less than Chinamen; and he said: 'My friends, you will be worse than Chinamen if 'you don't arm yourselves.' And he said they would be held responsible for the blood that would flow in the near future."

McKeough testifies: "Parsons, among other things, said, 'I am a tenant and I pay rent to a landlord. . . . The landlord pays taxes, the taxes pay the sheriff, the police, the Pinkerton knights, and the militia that are on duty out at the barracks, who are ready to shoot you down when you are looking for your rights. I am a socialist from the top of my head to the soles of my feet, and I will express my sentiments if I die before morning.' He said that very strongly and made a great commotion. That seemed to kind of catch the crowd in the neighborhood of the wagon and they let out a great cheer. . . . I went to the outer edge of the crowd. . . . The next remark I heard Mr. Parsons say, taking off his hat in one hand, he said, 'To arms, to arms, to arms,' three times distinctly."

English says: "Spies, I think, spoke fifteen or twenty minutes. . . ."

"Well, now here is an abstract of Parsons, and I can't give the exact language when he first started off. It was about the workingmen, that the remedy for their wrongs was in socialism.

"He said, without them they would soon become Chinamen. He said, 'It is time to raise a note of warning. There is nothing in the eight-hour movement to excite the capitalist.

" 'Don't you know that the military are under arms, and a gatling gun is ready to mow you down? Was this Germany, or Russia, or Spain? (A voice, 'It looks like it.') Whenever you make a demand for eight hours' pay, an increase of pay, the militia and the deputy-sheriffs and the Pinkerton men are called out and you are shot and clubbed and murdered in the streets. I am not here for the purpose of inciting anybody, but to speak out, to tell the facts as they exist, even though it shall cost me my life before morning.' Then he went on to tell about the Cincinnati demonstration and about the rifle-guard being needed.

"There is another part of it here. 'It behooves you, as you love your wife and children, if you don't want to see them perish with hunger, killed or cut down like dogs on the street, Americans, in the interest of your liberty and your independence, to arms, arm yourselves.'"

Simonson, a witness for the defense, says of the speech made by Parsons: "I remember in his speech he said: '*To arms, to arms, to arms,*' but in what connection I cannot remember."

There is no dispute about the fact that Spies spoke first, Parsons next and Fielden last. It is claimed by the defense that, just before Fielden closed his speech, Parsons left the speakers' wagon, or a wagon standing just north of it, on account of an appearance of rain, and went to Zepf's Hall, and that he was in the saloon at Zepf's Hall when the bomb exploded. Allen, one of the newspaper reporters, says: "When the bomb was thrown I was in the saloon of Zepf's Hall, standing about the middle of the room at the time. I did not see any of the defendants there. . . . I am almost certain Parsons was not at Zepf's Hall. . . . There was a constant passing to and fro from the furniture-workers' meeting upstairs

to the meeting over at the Hay-market. I was with Mr. Malkoff at Zepf's Hall." Parsons says that, "in a moment or two" after the explosion, two or three men rushed breathlessly in at the door of the saloon, and that he "remained there possibly twenty minutes or so." Knox, another newspaper reporter, swears that he had a conversation with Spies on the night of May 5th, and Spies then said that when the bomb exploded he ran to Zepf's Hall and there found a certain party *waiting for* Parsons.

The statement of Parsons, that he was in the saloon at Zepf's Hall when the bomb exploded, is sustained by the testimony of Ingram, of Malkoff, a Russian, who, on May 13, 1886, was a reporter for the Arbeiter Zeitung and a correspondent of a paper in Moscow, Russia, and had roomed with Rau and lived with Schwab; of Brown, a member of the American group, who had attended the meeting at 107 Fifth avenue on Tuesday night and had been arrested by reason of his connection with the Hay-market meeting; and of Wan-lray, who had belonged to the Northwest side group for three years before December, 1885.

Two circumstances are to be noted: *First*, it can hardly be said that Parsons was absent from the Hay-market meeting when he went into Zepf's Hall. It has already been stated that the latter place was only a few steps north of the speakers' wagon and in sight from it. Parsons himself says that, before he left the wagon, he "saw the lights through the windows of the hall." From the window of the saloon he was watching the proceedings around the wagon when the explosion occurred. He says: "All at once, looking directly at the meeting, I saw an illumination." *Second*, he did not start to Zepf's Hall until five or ten minutes before the police came up to the wagon. When he left the wagon for the saloon, Fielden had just uttered the words about stabbing and throttling the law, which had so excited the crowd as to induce McKeough to go to the Desplaines street station and report to the police inspector what had been said.

We do not think that the defendant Parsons can escape his share of the responsibility for the explosion at the Hay-market because he stepped into a neighboring saloon and looked at the explosion through the window. While he was speaking men

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stood around him with arms in their hands. Many of these men were members of the armed sections of the International groups. Among them were men who belonged to the "International Rifles," an armed organization in which he himself was an officer, and with which he had been drilling in preparation for the events then transpiring. To the men then listening to him he had addressed the incendiary appeals that had been appearing in the Alarm for two years. He had said to them: "One dynamite bomb properly placed will destroy a regiment of soldiers; a weapon easily made, and carried with perfect safety in the pockets of one's clothing." He had said to them on Saturday, April 24, 1886, just ten days before May 4, 1886, in the last issue of the Alarm that had appeared before May 4: "Workingmen, to arms! War to the palace, peace to the cottage, and death to luxurious idleness. The wage system is the only cause of the world's misery. One pound of dynamite is better than a bushel of bullets. Make your demand for eight hours with weapons in your hands to meet the capitalistic bloodhounds, police and militia, in proper manner;" and at the close of another article in the same issue he had also said: "*The social war has come, and whoever is not with us is against us.*"

To many of these same men, then gathered around the wagon from which he was speaking, after denouncing the police and militia as ready to shoot them down, he took off his hat and cried out: "To arms! To arms! To arms!" Within less than an hour after the delivery of this appeal, and on the spot where it was made, persons in the crowd, to which it was addressed, attacked the police with bomb and revolver, and Degan was killed. What is the law applicable to the state of facts here recited?

"If one purposely excites another to commit an offense, as, if he harangues people, inflaming them to a riot, and the offense is accordingly committed, he is guilty, though he personally takes no part in it." 1 Bishop on Criminal Law, 640.

In *Reg. v. Sharpe*, 3 Cox, C. C., 288, Chief Justice Wilde, in charging the jury, said:

"If persons are assembled together to the number of three or more, and speeches are made to those persons to excite and

inflammé them with a view to incite them to acts of violence, and if that same meeting is so connected in point of circumstances with a subsequent riot that you cannot reasonably sever the latter from the incitement that was used, it appears to me that those who incited are guilty of the riot, although they are not actually present when it occurs. I think it is not the hand that strikes the blow or that throws the stone (bomb) that is alone guilty under such circumstances; but that he who inflames peoples' minds and induces them by violent means to accomplish an illegal object is himself a rioter, though he take no part in the riot. It will be a question for the jury whether the riot that took place was so connected with the inflammatory language used by the defendant that they cannot reasonably be separated by time or other circumstances."

The jury were warranted in believing from the evidence that the defendant Parsons was associated with the man who threw the bomb, and the men who fired the shots at the Hay-market, in a conspiracy to bring about a social revolution in Chicago by force on or about May 1, 1886, or, in other words, to destroy the police and militia on or about that date with bombs and revolvers or rifles. It is well settled that, when the fact of a conspiracy is once established, any act of one of the conspirators in the prosecution of the enterprise is considered the act of all. *Nudd v. Burrows*, 91 U. S., 426; 1 Wharton's Am. Crim. Law, 6th ed., sec. 702; 3 Greenl. on Ev., sec. 94.

It makes no difference that Parsons may not have been present in the basement of Greif's Hall when the Monday night conspiracy was planned. He belonged to the armed sections, whose representatives entered into that conspiracy, and was one of the absent members who were to be informed of its provisions. One of those provisions was the holding of a meeting at the Hay-market. When he went to that meeting in obedience to a summons from Rau and there made an incendiary speech, he joined the others in their execution of the conspiracy and thereby became a party to it. "Individuals who, though not specifically parties to the killing, are present and consenting to the assemblage by whom it is perpetrated, are principals when the killing is in pursuance of the common de-

sign." Wharton on Homicide (2d ed.) sec. 201; Wharton's Am. Law of Homicide, p. 345, 346, etc.; *Reg. v. Jackson*, 7 Cox, C. C., 357; *Commonwealth v. Duley*, 4 Penn. L. J., 150.

The plan adopted on Monday night was merely a specific mode of carrying out the more general conspiracy, to which Parsons and those present on Monday night were all parties. The adoption of the Monday night plot was the *act* of those who were co-conspirators with Parsons. It was therefore his act. He had advised the use of bombs and arms against the police, on or about May 1st. The men who met Monday night merely indicated more specifically the time when, and places where, and mode in which, such bombs and arms should be used so as to be most effective.

"A man may be guilty of a wrong which he did not specifically intend, if it came naturally or even accidentally through some other specific or a general evil purpose. *When, therefore, persons combine to do an unlawful thing, if the act of one proceeding according to the common plan terminates in a criminal result, though not the particular result meant, all are liable.*" 1 Bish. C. L., 636, and cases cited.

"There might be no special malice against the party slain, nor deliberate intention to hurt him; but if the fact was committed in the prosecution of the original purpose, which was unlawful, the whole party will be involved in the guilt of him who gave the blow." Foster, 351, sec. 6. "Where there is a conspiracy to accomplish an unlawful purpose, and *the means are not specifically agreed upon or understood, each conspirator becomes responsible for the means used by any co-conspirator in the accomplishment of the purpose in which they are all at the time engaged.*" *State v. McCahill*, 30 N. W. R., 553.

He who enters into a combination or conspiracy to do such an unlawful act as will probably result in the unlawful taking of human life must be presumed to have understood the consequences which might reasonably be expected to flow from carrying it into effect, and also to have assented to the doing of whatever would reasonably or probably be necessary to accomplish the objects of the conspiracy, even to the taking of life. 1 Wharton's Crim. Law, sec. 225a (9th ed.); *Brennan et al. v. People*, 15 Ill., 511; *Hanna v. People*, 86 Ill., 243; *Lamb v. People*, 96 Ill., 74.

NEEBE.

The defendant Neebe, as has already been stated, was a member of the North side group, which had resolved "not to meet the enemy unarmed on May 1, 1886." He was one of the stockholders of the Arbeiter Zeitung, and, next to Spies and Schwab, the most active man in its management. He was looked for and found at the Arbeiter Zeitung office in consultation with Spies and Schwab during the week prior to May 4th. The testimony of Gruenhut shows that Neebe was active in organizing and preparing for the movements then going on. He was found in possession of the Arbeiter Zeitung building after the arrest of Spies and Schwab, and announced himself as the person who had charge of the office. He stated to the officers that a package of dynamite, which they found in a closet on one of the floors of the building, was something for "cleaning type." There were found at his house, on May 7th, a red flag, a sword, a breech-loading gun and a 38-caliber Colt's revolver, five chambers of which had been fired; one chamber was loaded with a cartridge and one had a shell in it. He is shown to have presided at meetings where the use of arms and dynamite against the police was advocated. On Monday night, May 3, 1886, he was seen distributing the "Revenge" circulars. He took a package of them into a saloon at the corner of Franklin and Division streets on that night, between 9 and 10 o'clock, and placed some on the counter and some on the tables, while seven or eight persons were present. He stated there, that the circulars had just then been printed. He exhibited anger towards the police, and said, in reference to the riot of that afternoon: "It is a shame that the police act that way, but maybe the time comes that it goes the other way, that they get the chance, too."

When a man, as prominently connected as Neebe was with the International organization and its organ and leaders, was proven to have been engaged late on the night before the Hay-market murder in distributing an inflammatory circular calling upon ignorant workingmen to arm themselves and avenge the act of the police in quelling a riotous disturbance, we cannot say that the jury were not justified in holding him responsible, along with his confederates, for the murder on Tuesday night of one of the very policemen whose death he was urging and

advocating on Monday night. We do not think that the trial court erred in refusing the instructions asked on his behalf.

Various errors are assigned upon the record. These errors relate to the evidence introduced, the instructions given and the impaneling of the jury.

It is claimed that the trial court admitted improper testimony. The newspaper articles and the speeches, already referred to, are complained of as having been improperly received in evidence.

We think there was no error in admitting them, for the following reasons:

1st. The International Association in Chicago, as above described, was an illegal organization engaged in making bombs and drilling with arms for the unlawful purpose of attacking the police if the latter should assume to do their duty in the protection of the public peace. Its members were conspirators, and, by their act of conspiring together, they "jointly assumed to themselves, as a body, the attribute of individuality, so far as regards the prosecution of the common design." 3 Greenl. on Ev., sec. 93. The papers which published the articles in question were the organs of the conspiracy. The men who made the speeches in question were its spokesmen and mouthpieces. Hence the utterances of these papers and speakers were competent evidence as showing the purposes and intentions of the conspiracy which they represented.

2d. Spies, Schwab, Parsons and Engel were responsible for the articles written and published by them, as above shown. Spies, Schwab, Fielden, Parsons and Engel were responsible for the speeches made by them respectively. As against these defendants the articles and speeches in question were properly introduced in evidence, not because they gave general advice to commit murder, but because they advised and encouraged a particular class in Chicago, to wit, the members of the International groups, and such other workingmen as could be persuaded to join them, "to arm themselves with guns, revolvers and dynamite," and kill another particular class in Chicago, to wit, the police, at a particular time, to wit, about May 1, 1886. There is evidence in the record tending to show that the death of Degan occurred during the prosecution of a conspiracy planned by members of the International groups who read

these articles and heard these speeches. How far the formation and execution of this conspiracy may have been aided and encouraged by the printed and spoken utterances of the particular defendants here named was a proper matter for the jury to consider in the light of all the other circumstances developed by the testimony in this case.

3d. The evidence objected to was properly introduced against all the defendants. When the conspiracy is once established, every act and declaration of each member in furtherance of the common design is, in contemplation of law, the act and declaration of all the members, and is therefore original evidence against each of them. "It makes no difference at what time any one entered into the conspiracy." 1 Greenl. on Ev., sec. 111. All the defendants in this case are proven to have belonged to the illegal organization above specified. Hence they were all co-conspirators. The speeches and newspaper articles here under consideration were in furtherance of the common design. Being the acts and declarations of some of the conspirators they were the acts and declarations of all of them. It is not necessary to hold that the conviction of the defendants in this case is to stand merely because they made speeches and published articles advising the murder of the police. Such conviction is sustained because there is evidence in the record from which the jury were warranted in believing that the defendants advised, encouraged, aided and abetted the preparation of the crime committed at the Hay-market. When they combined or conspired together, with a view of bringing about the crime, and became united in a common plan for its commission, then the acts and declarations of any one of them, which had the effect of advising, encouraging, aiding and abetting its perpetration, were the acts and declarations of all.

We do not agree with the position of counsel that the general conspiracy hereinbefore described and the plot of Monday night, May 3, 1886, were two separate conspiracies. The latter was merely the outgrowth and culmination of the former. The latter merely designated the particular mode in which the objects of the former were to be effected. It was competent to show the acts and declarations of the parties to the general conspiracy, which preceded and led up to the formation of the

special plot of May 3, with a view of understanding the latter.

The defendants were engaged in a series of efforts to increase the International groups by accessions from the workmen, and to educate and discipline those groups in the making of bombs and in the use of fire-arms so as to prepare them for a conflict with the police when the eight-hour excitement should reach its height. Among these efforts were the speeches made and the publications issued as hereinbefore stated. The Monday night conspiracy was the product of these efforts, and could only be understood by showing their nature and character. These views are sustained by the following authorities: *Campbell v. Commonwealth*, 84 Penn. St., 187; *State v. McCall*, 30 Northwestern Reporter, 553; *Cord v. State*, 9 Northwestern Reporter, 591; *Rex v. Hammond*, 2 Espinasse, 718; *People v. Mather*, 4 Wend., 261; 2 Bishop, Crim. Practice, 277; *United States v. Cole*, 5 McLean, 601; *The Queen v. Most*, L. R., 7 Q. B. D., 244. The admission in evidence of Johann Most's book on the Science of Revolutionary Warfare is complained of as error. The work, which is called a book, is really nothing more than a treatise, in pamphlet form, upon the most improved methods of making bombs and preparing dynamite and other explosives. It is thus characterized by the counsel for plaintiffs in error in their brief: "Here was a voluminous incendiary, outrageous publication, going into the detail of the manufacture of explosives and arms and the manner of preparing them, filled with vile suggestions as to how to apply the results of modern science to the work of destruction of the capitalistic system, abounding in advice to persons who, as members of the so-called revolutionary forces, might purpose to engage in the use of these weapons and explosives."

The circulation of this treatise was an act of the illegal organization to which all the defendants belonged, and was one of the methods by which that organization instructed and advised its members to get ready for the murder of the police during the eight-hour excitement. Its distribution among the members of the International groups at their picnics and meetings through the agency of the International Association is proven beyond controversy. The newspaper organs commended it and quoted from it and advertised it without charge.

Lingg and Fischer read it and acted upon the suggestions contained in it. When the leaders of the organization thus made use of this treatise, they adopted it as a manual of tactics, and it became a book of their written advice and instructions to their followers. It was competent testimony as showing the purposes and objects which they had in view and the methods by which they proposed to accomplish those objects. When the newspaper organs commended its study to their readers they made its suggestions a part of their own advice to those readers. The efforts of the defendants who controlled these organs to put this pamphlet into the hands of the members of the International groups were acts and declarations in furtherance of the conspiracy and were binding upon the other defendants.

It is also assigned as error that the trial court admitted in evidence a letter, written to the defendant Spies in 1884, by Johann Most, the author of the treatise above referred to. The letter is set out in the statement which prefaces this opinion. [Statement omitted.]

The defendant Spies took the stand as a witness for the defense. Upon his cross-examination the prosecution produced the letter in question, examined him in reference to it, and then offered it in evidence, and it was admitted.

The main objection is that after the arrest of Spies certain effects of his, including this letter, were seized by the police in the Arbeiter Zeitung office without a search warrant or other legal process; that such seizing was in violation of the United States and Illinois constitutions, and that the admission of the letter "was," in the language of counsel for plaintiffs in error, "improper as being in effect a compelling of the plaintiffs in error to give testimony against themselves, contrary to the provision of the fifth amendment of the federal constitution and to the provision of article 2 of our constitution of 1870." In other words, the introduction of the letter is objected to in this court, as having been in contravention of the principles laid down by the supreme court of the United States in *Boyd v. The United States*, 116 U. S., 616. In that case an act of congress authorizing the federal courts to require parties charged with violations of the revenue laws to produce their books, invoices and papers for inspection and for use in evi-

dence against themselves, was declared to be unconstitutional. In the case at bar, the defendants were not required to produce the letter; the state had the letter and produced it. We will not attempt, however, to draw any distinction between this case and the *Boyd Case*. We do not think that the record is in such shape as to permit counsel to make the point urged by them before this court.

In the first place it is not clear from the testimony that the letter from Most was seized by the police in the manner suggested. Early in the trial two police officers, testifying for the prosecution, stated that on May 5, 1886, they took possession of a number of articles found in the office of the Arbeiter Zeitung newspaper, among which were certain letters lying on the desk occupied by Spies, and certain other letters in the drawer of the desk. But it nowhere appears in the record, so far as we can find, that this particular letter from Most to Spies, introduced near the close of the trial, was among the letters so taken from the top of Spies' desk or among those taken from the drawer of it. For aught that appears to the contrary, this letter may not have come to the hands of the state through the alleged seizure complained of, but may have been obtained in some other proper and legitimate manner. We cannot infer that because certain letters were seized by the police the Most letter must have been one of them.

On the trial below counsel for the defense took the position that the letter was not found in the possession of Spies. We find the following statement in the record of what occurred, when the trial judge passed upon the offer to introduce the letter: The Court: Letters which have never been in the possession of the defendant cannot be admissible in evidence against him. Mr. Black: There is no evidence in this case that the letter was found in his possession. The Court: He says he received it.

This brings us to the second reason why the point now under consideration cannot be made here.

The objection that the letter was obtained from the defendant by an unlawful seizure is made for the first time in this court. It was not made on the trial in the court below. Such an objection as this, which is not suggested by the nature of the offered evidence, but depends upon the proof of an out-

side fact, should have been made on the trial. The defense should have proved that the Most letter was one of the letters illegally seized by the police, and should then have moved to exclude it or opposed its admission on the ground that it was obtained by such illegal seizure. This was not done, and, therefore, we cannot consider the constitutional question supposed to be involved.

The only objections made to the Most letter, which we find in the record, were: First, that it was not proper cross-examination; second, that it had not been answered by Spies.

The defendant Spies, on his direct examination, had explained his possession of two bombs with iron shells by saying that an unknown person, who claimed to be a shoemaker named Schwape, and to be on his way from Cleveland to New Zealand, had called at the Arbeiter Zeitung office, and, asking Spies if he had seen one of the bombs "they" were making, had left the two iron shells, saying "he would not take them along." Spies also testified that a stranger had called at the office in his absence and left two "Czar" bombs on his desk, stating to the book-keeper or office boy that he came merely to "inquire whether those were bombs of a good construction, and the man never called for them." He further testified that he procured the cartridges of dynamite and coils of fuse and detonating caps found in his office for the mere purpose of experimenting, without explaining why he wanted to experiment. He stated that he showed these things, or some of them, to the reporters, who swear to having seen them there, merely to give them something sensational to write about in their papers.

The Most letter and the questions about its contents were proper subjects for cross-examination, because they tended to test the sincerity of the claim made by him on his direct examination that he had no *serious* object in view in keeping the dynamite and other articles which he had on hand. That letter shows on its face that some communication or message had passed between Spies and Most as to a "letter from the Hocking Valley." It also shows that Most proposed to send twenty or twenty-five pounds of what he calls "*medicine, and the genuine article at that,*" to one Buchtell, and asks Spies for directions how to send it. Taken in connection with other evidence, the

letter tended to show that Spies and Most were engaged in the very *serious* business of supplying dynamite to discontented laboringmen.

The second objection to the letter was that it was unanswered, and therefore inadmissible on the ground that a letter written to a party by a third person, to which no reply is made, does not show an acquiescence in the facts stated in it. As we understand the evidence of the defendant Spies, he admits that this letter is in the handwriting of Most, and that he received it from Most and read it. He does not say that he did not answer it, but that he does not remember whether he answered it or not. We do not think, however, that it can be regarded as an unanswered letter. To all intents and purposes it *was* answered. Spies swears that he did not himself give the directions asked for by Most in the letter as to shipping the "medicine" or "genuine article," but he also says: "There may have been a letter addressed to my care which I may have sent to him." If he procured a third person to write a letter, giving directions how to ship material to the point indicated, and then inclosed this letter to Most, he, in effect, answered the only portion of Most's letter which required an answer. Moreover, the letter shows in its opening sentences that it was "*invited*" by Spies (Wharton's Criminal Evidence, 9th ed., secs. 644 and 682), and that it was written in response to some former communication by him.

It is also objected that the cross-examination of those of the defendants who took the stand compelled them to give evidence against themselves. After careful examination of the testimony of these defendants as set out in the record, we cannot see that they were cross-examined upon any subject not connected with the direct examination. If a defendant offers himself as a witness to disprove a criminal charge, he cannot excuse himself from answering on the ground that by so doing he may criminate himself.

"So far as concerns questions touching the merits, the defendant, by making himself a witness as to the offense, waives his privileges as to all matters connected with the offense.

"It has been ruled also, that to affect his credibility he may be asked whether . . . he has been concerned in other crimes, part of the same system." Whart. Crim. Ev., sec. 432.

Objection is also made that certain articles which had been struck and torn and otherwise injured through the explosion of the Hay-market bomb, and also through the explosion, by way of experiment, of certain bombs made by the defendant Lingg, were improperly introduced before the jury. It was the claim of the International Association and its organs and speakers, constantly put forth by them to the workingmen to induce the latter to join the movement against the police and militia, that a dynamite bomb in the hands of one man was equal in destructive power to a regiment of soldiers armed with rifles. The articles in question were presented in the condition in which they were left after being exposed to the force of an exploding bomb, for the purpose of showing the power of dynamite as an explosive substance. While this kind of testimony may not have been very material, we cannot see that it was to such an extent incompetent as to justify a reversal.

It is also objected that the trial court allowed bombs and cans containing dynamite, and prepared with contrivances for exploding it, which had been found under sidewalks and buried in the ground at certain points in the city, to be introduced in evidence.

Among these were the bombs hidden by Lingg and Seliger, under the sidewalk on Sigel street, and those given by Lingg to Lehmann and buried by Lehmann near Ogden Grove, and those given by Lingg to Thielen and found upon the latter's premises.

As specimens of the kind of weapons which Lingg and his associates were preparing, and as showing the malice and evil heart which the intended use of such weapons indicated, the introduction of bombs made by him was not improper. The jury had a right to see them and compare their structure with the descriptions of the bomb that killed Degan, with a view of determining whether Lingg was the maker of the latter or not. As to the fact that some of these bombs and cans, like those shown to the American group during their drill, were found buried near Wicker Park — one of the designated meeting places where certain of the armed men were to gather on Tuesday night,—this was a circumstance proper to be considered by the jury in determining the nature and character

of the conspiracy and its connection with the events of Tuesday night. As to the suggestion that these things may have been placed where they were found by other parties than those connected with the conspiracy herein described, it was for the jury to say, whether, under all the circumstances, any others than the members of that conspiracy had undertaken to make such weapons or knew anything about them.

It is again urged as error that a witness on the part of the state, for whom Schnaubelt had been working, was allowed to testify that the latter cut off his beard a few days after the night of May 4th. In the photograph that has been referred to he had a beard.

Gilmer swore that Scheaubelt had a beard when the bomb was thrown. To explain the fact that he was seen without a beard after the Hay-market meeting, it was shown that he cut off his beard subsequently to the date of that meeting. The statement made by the witness was merely for the purpose of identification. It was not very important, and we cannot see that it did any harm.

It is also objected that some testimony was admitted as to conversations with the defendant Spies, which were merely narrative of what had been or would be done. It is undoubtedly the law that, after a conspiracy is established, only those declarations of each member *which are in furtherance of the common design* can be introduced in evidence against the other members.

Declarations that are merely narrative as to what has been done or will be done are incompetent and should not be admitted, except as against the defendant making them, or in whose presence they are made. The utterances of the defendant Spies, whether in his paper, his speeches or his conversations, were in furtherance of the purposes and objects of the conspiracy in which he was engaged.

If testimony as to expressions used by him, that are not of the character here indicated, has crept into the record, it is so inconsiderable that it could not have in any way injured the other defendants. We think this point was sufficiently guarded by the trial judge in his rulings and in his instructions.

A further objection is made as to the *order* in which the trial court permitted certain portions of the evidence to be in-

roduced. It is claimed that some of the acts and declarations proven in the case were allowed to come in before proof was made of the conspiracy or of the connection of the defendants with it. This matter is largely discretionary with the trial judge.

The proof of conspiracy which will authorize the introduction of evidence as to the acts and declarations of the co-conspirators may be such proof only as is sufficient in the opinion of the trial judge to establish *prima facie* the fact of conspiracy between the parties, or proper to be laid before the jury as *tending* to establish such fact. 1 Greenl. on Ev., sec. 111. Sometimes, for the sake of convenience, the acts or declarations of one are admitted in evidence before sufficient proof is given of the conspiracy, the prosecutor undertaking to furnish such proof in a subsequent stage of the cause. *Id.*

The rule that the conspiracy must be first established *prima facie* before the acts and declarations of one conspirator can be received in evidence against another cannot well be enforced "where the proof of the conspiracy depends upon a vast amount of circumstantial evidence, a vast number of isolated and independent facts; and, in any case, where such acts and declarations are introduced in evidence, and the whole of the evidence introduced on the trial, taken together, shows that such a conspiracy actually exists, it will be considered immaterial whether the conspiracy was established before or after the introduction of such acts and declarations." *State v. Winnid*, 17 Kan., 298.

The prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Roscoe's Crim. Ev., p. 415 (7th ed.).

In many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. *Id.* In some particular instances, in which it would be difficult to establish the defendant's privity without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity. Roscoe's Crim. Ev., p. 414.

The term "acts" as here used includes written correspond-

ence and other papers relative to the main design. 1 Greenl. on Ev., sec. 111.

Many other objections to different items of testimony are insisted upon by counsel for the defense. We have noticed those which have seemed to us to be the most important. Any further comment would swell this opinion, already of inordinate length, into still more tiresome proportions. Taking the whole record together, we are unable to see that the lower court committed any such errors, either in the admission or exclusion of evidence, as prejudiced the rights of the defendants.

The second class of errors assigned relates to the giving and refusal of instructions.

First. The instructions numbered 4 and 5½, which were given for the state, are claimed to be erroneous because they did not require the prosecution to establish the identity of the bomb-thrower. The fourth instruction told the jury that, upon a given state of facts, certain members of the conspiracy mentioned would be guilty of murder, "whether the identity of the person throwing the bomb be established or not." Instruction No. 5½ said: "All of such conspirators are guilty of such murder whether the person who perpetrated such murder can be identified or not," etc. The identity here intended had reference to name or personal description. The jury were expressly required by the fourth instruction to find from the evidence that the person throwing the bomb was at the time a member of the conspiracy to unlawfully resist the officers of the law, and that he threw the bomb "in pursuance of such conspiracy and in furtherance of the common object."

The theory of the fourth instruction was that the bomb-thrower was sufficiently identified if he belonged to the conspiracy, and if he threw the bomb to carry out the conspiracy and further its designs, even though his name and personal description were not known. We do not think that this theory was an erroneous one.

Counsel for plaintiffs in error say that "membership in the supposed conspiracy could not be proved without some evidence of identification." In the first place, some of the counts in the indictment charged that Rudolph Schnaubelt threw the bomb. Evidence was introduced tending to support these counts. If the jury believed it, they must have found that the

crime was committed by a member of the conspiracy, the proof as to Schnaubelt's membership in it being uncontradicted.

In the next place some of the counts in the indictment charged that the bomb was thrown by an unknown person. All the proof introduced by the defendants themselves, tending to show that Schnaubelt did not throw the bomb, tended also to prove that an unknown person threw it. If the jury believed the evidence of the defense upon this subject, they had before them other testimony from which they were justified in believing that the bomb-thrower, though unknown by name or personal description, was a member of the conspiracy and acting in furtherance of its objects. The testimony introduced by the state tended to show that the bomb-thrower threw a bomb made on Tuesday afternoon by Liung, the agent of the conspiracy; that he obtained it from a place where only a member of the conspiracy could have obtained it, and at a time when no one but such a member would have sought to obtain it; that he threw it at a meeting appointed by the conspiracy, from the midst of a company of persons belonging to the conspiracy, upon the happening of a contingency provided for by the conspiracy, and as part of an attack planned by the conspiracy. These and other circumstances already spoken of were sufficient to establish his membership.

It is a mistake to assume that a defendant cannot be charged with advising, encouraging, aiding and abetting an unknown principal in the perpetration of a crime. Suppose that A. instructs B. to hire some person to kill C. B. hires a person whose name is unknown to A., and never becomes known to the state, and that person kills C. in pursuance of B.'s employment. Will it be said that A. is not guilty as an accessory before the fact, because the instrument employed by B. is unknown by name or personal description? Archbold says that if the principal felon be unknown, the indictment of the accessory may state it accordingly. *Pr. & Pl.*, vol. 1, p. 67. It is also held that if the principal is declared to be unknown in the indictment, and the proof on the trial shows that he is known, there is a fatal variance. *Rex v. Walker*, 3 Camp., 264; *Rex v. Blick*, 4 C. & P., 377.

But where there are two separate counts, one charging

the principal to be known, and the other charging him to be unknown, it is sufficient if either is proven. Whart. Crim. Law, vol. 1, secs. 207, 225, 226 and 231; Bishop, C. L., vol. 1, secs. 651, 677; *Reg. v. Tyler*, 8 C. & P., 616; *State v. Green*, 26 S. C., 105, 128; *Pilger v. Com.*, 112 Penn. St., 220; *Brennan v. People*, 15 Ill., 516; *Baxter v. People*, 3 Gilm., 368; *Ritzman v. People*, 110 Ill., 362. The objection, that the instructions on behalf of the state are faulty in not requiring the principal in the commission of the crime charged to be identified, is not well taken.

Counsel for plaintiffs in error make the general objection that the instructions for the state were at variance with the proof introduced by the state. If we understand the meaning of this objection, it is this: that some of the counts in the indictment having charged the defendants with advising, encouraging, aiding and abetting Schnaubelt in the perpetration of the crime, and the state having introduced testimony to show that Schnaubelt *did* perpetrate the crime, therefore the instructions should have directed the attention of the jury solely and exclusively to the theory that Schnaubelt was the perpetrator of the crime, and that such instructions were erroneous in having called the attention of the jury to the theory that an unknown person may have been the perpetrator of the crime, notwithstanding the fact that some of the counts charged the defendants with advising, encouraging, aiding and abetting an unknown person in the commission of the crime, and notwithstanding the fact that there was evidence in the record tending to show that the perpetrator of the crime *was* an unknown person. We regard this position as wholly untenable.

Under our statute and the construction given to it by the decisions of this court (*Baxter v. People*, 3 Gilm., 368, and other cases), the man who, "not being present aiding, abetting or assisting, hath advised, encouraged, aided or abetted *the perpetration of the crime*," may be considered as the *principal* in the commission of the crime, may be indicted as principal, and may be punished as principal. The indictment need not say anything about his having aided and abetted either a known principal or an unknown principal. It may simply charge him with having committed a murder as principal.

Then, if, upon the trial, the proof shows that he aided, abetted, assisted, advised or encouraged the perpetration of the crime, the charge that he committed it *as principal* is established against him. It would make no difference whether the proof showed that he so aided and abetted, etc., a *known* principal or an *unknown* principal.

In the case at bar, some of the counts in the indictment charge the defendants with the murder of Degan as *principals* and not as accessories before the fact. If the jury believed from the evidence that the defendants aided, abetted, advised or encouraged the perpetration of such murder, then they were justified in finding the defendants guilty as principals, as charged in the indictment. The material question for them to consider was not so much whether the man who threw the bomb was a known person or an unknown person, as whether these defendants aided, abetted, advised or encouraged the throwing of the bomb.

The instructions commented upon and not fully quoted in this opinion are set out in the statement which precedes it. They will not be here quoted, except so far as may be necessary to understand the comments made upon them.

The portion of the fifth instruction for the state, which is complained of by the plaintiffs in error, is found in the following words: "Although the jury may further believe from the evidence that the time and place for the bringing about of such revolution or the destruction of such authorities had not been definitely agreed upon by the conspirators, but was left to them and the exigencies of time or to the judgment of any of the conspirators."

It is said that there was no evidence in the record to support the hypothesis contained in the quotation here made. We think there was such evidence. The hypothesis is, that the time and place for bringing about the destruction of the authorities was left to the judgment of some of the conspirators, instead of being definitely agreed upon by all of them. The publication of the word "Ruhe" in the Arbeiter Zeitung was to indicate the *time* for the social revolution to begin and for the armed men to gather at their meeting-places. Its publication was left to the judgment and discretion of a committee appointed by the conspirators. This committee was also to report to the

armed men at what *place* the conflict with the police had occurred.

Counsel for plaintiffs in error claim that instruction No. 5 $\frac{1}{2}$, given for the state, was erroneous mainly for the following reasons, to wit: 1st. "Because it assumes that mere *general advice* to the public at large to commit deeds of violence, as contained in speeches or publications, without reference to the particular crime charged, and without specifying object, manner, time or place, works responsibility as for murder." 2d. "Because in it 'there was the fatal error of an omission of all *reference to the evidence*,' or in other words, that 'the jury are not told in it that *if they find from the evidence* so and so, then they can conclude thus and so.'"

As to the last objection, we think that the defect therein indicated was cured by the instruction which the trial judge gave to the jury *suo motu*. We have held that a judge of the circuit court is at liberty to instruct at his discretion if he reduces his instructions to writing, so that the jury can take them with them in considering their verdict. *Brown v. People*, 4 Gilm., 439; *Brown v. Lewis*, 13 Ill., 612. In this case, the judge who presided at the trial in the court below himself wrote an instruction and read it to the jury, which contained the following words:

"What are the facts and what is the truth the jury must determine *from the evidence, and from that alone*. If there are any unguarded expressions *in any of the instructions*, which seem to assume the existence of any facts, or to be any intimation as to what is proved, all such expressions must be disregarded and the *evidence only* looked to to determine the facts." It is difficult to see how, after such a clear and explicit injunction as this, the jury could have made any finding that was not based on the evidence.

As to the first objection, if we construed the instruction to mean what counsel claim it to mean, we would be forced to agree with them, that it was erroneous.

It is the duty of the jury to consider all the instructions together, and when this court can see that an instruction in the series, although not stating the law correctly, is qualified by others, so that the jury were not likely to be misled, the error

will be obviated. *Toledo, W. & W. Ry Co. v. Ingraham*, 77 Ill., 309.

Although an instruction, considered by itself, is too general, yet if it is properly limited by others given on the other side, so that it is not probable that it could have misled the jury, judgment will not be reversed on account of such instruction. *Kendall v. Brown*, 86 Ill., 387; *Skiles v. Caruthers*, 88 Ill., 458.

The supreme court of Iowa has said: "It is usually not practicable in any one instruction to present all the limitations and restrictions of which it is susceptible. These very frequently must be presented in other and distinct portions of the charge. The charge must be taken together, and if, when so considered, it fairly presents the law and is not liable to misapprehension nor calculated to mislead, a cause should not be reversed simply because some one of the instructions may lay down the law without sufficient qualification." *Rice v. City of Des Moines*, 40 Iowa, 638.

The same court held in a criminal case, where the indictment was for murder, that "instructions are all to be considered and construed together," and that an omission to state the law fully in one instruction, where the omission is fully supplied in another, does not constitute error. *The State v. Maloy*, 44 Iowa, 104.

The supreme court of California said in a criminal case: "While some of instructions are subject, perhaps, to criticism and may not state the law with precise accuracy, yet, taken as a whole, they were substantially correct and could not have misled the jury to the prejudice of the defendant." *People v. Cleveland*, 49 Cal., 577.

The principle here announced, that an instruction which is general in its character may be limited or qualified by other instructions in the series, does not contravene the rule that, in a criminal case, "material error in one instruction calculated to mislead is not cured by a subsequent contradictory instruction." Whart. Cr. Pl. & Pr., 5th ed., sec. 793.

An application of the foregoing views to the instruction now under consideration will show that it could not have misled the jury to the prejudice of the defendants.

Counsel contend that the language of instruction No. 5½ was

broad enough to lead the jury to believe that, if some other person than either of the plaintiffs in error had advised and encouraged the commission of the murder, and the murder had been committed by reason of his advice and encouragement, the plaintiffs in error would be guilty, provided such person was a party with them to the conspiracy to excite crime, etc. The instructions for the defense, however, limited the responsibility of the defendants to such advice and encouragement as were given by themselves alone.

In one instruction given for the defense the court charged the jury as follows: "Unless the prosecution has established in the minds of the jury, beyond all reasonable doubt, that either some of the defendants threw the said bomb, or that *the person who did so throw the same was acting under the advice and procurement of defendants or some of them*, the defendants and all of them should be acquitted."

In another instruction given for the defense the court said: "It will not do to guess away the lives or liberties of our citizens, nor is it proper that the jury should guess that *the person who threw the bomb which killed Degan was instigated to do the act by the procurement of defendants or any of them*. That fact must be established beyond all reasonable doubt in the minds of the jury," etc.

In still another instruction for the defense the court said: "Therefore the jury must be satisfied beyond all reasonable doubt that *the person throwing said bomb was acting as the result of the teaching or encouragement of defendants or some of them*, before defendants can be held liable therefor, and this you must find from the evidence."

Counsel also claims that the instruction now under consideration may be construed to mean that *mere general advice*, in print or by speech, addressed to the public at large, urging them to commit deeds of violence, works responsibility for murder. If the instruction was too general in this regard, it was limited and qualified by other instructions given for the defendants.

In an instruction given for the defense the court said to the jury: "It will not do to say that, because defendants *may have advised violence*, that therefore, when violence came, it was the result of such advice. There must be a direct connection es-

tablished by credible testimony between the advice and the consummation of the crime, to the satisfaction of the jury, beyond all reasonable doubt."

In another instruction for the defense—and all the instructions for the defense were prepared by the defendants themselves, and the giving of them was asked by the defendants—the court said: "Before a party can be lawfully convicted of the commission of a crime under our statute concerning accessories, it is incumbent on the prosecution to show beyond all reasonable doubt, by credible evidence, that the crime was committed by some persons or person acting under the advice, aid, encouragement, abetting or procurement of the defendant or defendants whose conviction is asked. Though the jury should believe from the evidence that a party in fact *advised generally* the commission, in certain contingencies, of acts amounting to crime, yet if the act complained of was in fact committed by some third party of his own mere volition, hatred, malice or ill-will, and not materially influenced, either directly or indirectly, by such advice of the party charged, or if he was actuated only by the advice of other parties not charged, and for whose advice the defendants are not responsible, the party charged would not in such case be responsible."

In another instruction for the defense the court said: "Although the defendants or some of them may have spoken and also published their views to the effect that a social revolution should be brought about by force, and that the officers of the law should be resisted, and, to this end, dynamite should be used to the extent of taking human life, that persons should arm to resist the law, that the law should be throttled and killed; and *although such language might cause persons to desire to carry out the advice given as aforesaid and do the act which caused Officer Degan's death*, yet the bomb may have been thrown and Degan killed by some one unfamiliar with and unprompted by the teachings of defendants or any one of them. Therefore, the jury must be satisfied, beyond all reasonable doubt, that the person throwing said bomb was acting as the result of the teaching or encouragement of the defendants," etc.

The instruction last quoted, which was drawn by the counsel for the defense and given at their request, recognizes and

admits the claim that advising, encouraging, aiding and abetting murder, within the meaning of our statute, may be effected through the utterance of such speeches and the publication of such articles as have been heretofore referred to. The only thing insisted upon in the instruction is that the proof must show clearly and beyond a reasonable doubt the connection between the speeches and publications as the cause, and the murder as the result.

The last instruction given for the defendants limited the instructions, having reference to general advice to commit murder or general conspiracy to commit murder, by calling the attention of the jury specifically to the Monday night plot. It was as follows: "If the jury find that on the evening of May 3d, at 54 West Lake street, at a meeting at which some of the defendants were present, a proposition was adopted that in the event of a collision between the police force, militia or firemen on one side, and the striking laborers on the other, it was agreed that certain organizations, of which some of the defendants were members, should meet at certain designated places in the city of Chicago; that a committee should attend public places and public meetings where an attack by the police and others might be expected, and, in the event of such an attack being made, report the same to said armed sections as aforesaid, to the end that such attack might be resisted and the police stations of the city destroyed; and if the jury further find that on the night of May 4 some person unknown went to a meeting at the Hay-market and threw a bomb into the assembled police, the explosion of which killed Mathias J. Degan, and that from all the evidence in the case the jury are not satisfied beyond all reasonable doubt that said act causing the death of said Degan was the result of any act *in furtherance of the common design as therein stated*, but may have been the unauthorized and the individual act of some person acting upon his own responsibility and volition, then none of the defendants can be held responsible therefor on account of said West Lake street meeting."

But instruction No. 5½ will not be found to be so general in character as it is claimed to be, if its language is carefully analyzed and considered in connection with other instructions given for the state.

The persons referred to therein as being excited to tumult and riot, and to the use of deadly weapons, and to the taking of life, are "the people or classes of people of this city." The expression is in the alternative. "Classes of people of this city" are words which, when construed in the light of the evidence in this record, could only have been understood to designate workingmen of the city of Chicago connected with the groups already referred to. The persons advised by print or speech to commit murder were the same persons who were excited to tumult and riot, etc. Therefore the instruction, fairly interpreted, means that the persons advised to commit murder were the workingmen belonging to and acting with the International groups, and that the murder spoken of as resulting from the advice given was murder committed by one or more of such workingmen. It is said that the instruction does not indicate the murder of Degan, but speaks simply of murder generally. It was not necessary to repeat the name of Degan in every instruction. The instructions must be considered together, and as Degan's name was mentioned in the two instructions preceding, and the one following No. 5½, the jury could not have been misled upon this subject. The words, "whether the person who perpetrated such murder can be identified or not," could have referred to no one else than the man who threw the bomb that killed Degan.

The words "without designating time, place or occasion" must be taken with the qualification given to them in the fifth instruction, that is to say, such time, place and occasion as the committee of the conspirators appointed for that purpose might designate.

According to the theory of this instruction, the defendants conspired to excite certain classes to tumult, riot, use of weapons and taking of life, "as a means to carry their designs and purposes into effect." The instruction does not specify what those designs and purposes are, because they had been stated in the two preceding instructions to be the bringing about of a social revolution and the destruction of the authorities of the city. The ordinary workingman had two purposes in view: first, to get an eight-hour day of labor; second, to keep the police from interfering to protect non-union laborers against strikers. The defendants in this case cared nothing about the

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eight-hour movement or the contentions between union and non-union men. They looked beyond to the social revolution. They sought to make use of the excitement among the workmen over the eight-hour movement and over the attacks of police upon strikers, in order to create riot and tumult and thus precipitate the social revolution. The stirring up of riot and tumult was with them a means to an end. There is testimony tending to support this view. The men who excited the tumult and riot by print and speech may have had a different end in view from that sought by the classes whom they so excited. But they were none the less responsible for murder that resulted from their aid and encouragement.

If the defendants, as a means of bringing about the social revolution and as a part of the larger conspiracy to effect such revolution, also conspired to excite classes of workmen in Chicago into sedition, tumult and riot, and to the use of deadly weapons and the taking of human life, and, for the purpose of producing such tumult, riot, use of weapons and taking of life, advised and encouraged such classes, by newspaper articles and speeches, to murder the authorities of the city, and a murder of a policeman resulted from such advice and encouragement, then defendants are responsible therefor.

It is a familiar doctrine of the law in criminal cases, that, if a reasonable doubt of the guilt of the prisoner is entertained, the jury have no discretion, but must acquit. The twelfth and thirteenth instructions for the prosecution are objected to as not correctly stating to the jury the meaning of "reasonable doubt." The twelfth instruction is an exact copy, *verbatim et literatim*, of the sixth instruction in *Miller et al. v. The People*, 39 Ill., 457, which we approved in that case, and which, since that case, we have indorsed as correct in at least three cases, to wit, *Hay v. The People*, 60 Ill., 119; *Connaghan v. The People*, 88 Ill., 400; and *Dunn v. The People*, 109 Ill., 635.

The portion of the thirteenth instruction which plaintiffs in error complain of is that which is contained in the following words: "You are not at liberty to disbelieve as jurors if, from the evidence, you believe as men." This expression has been sanctioned by the supreme court of Pennsylvania as having been properly used in an instruction given to the jury by a trial

judge, and we are inclined to follow the ruling there laid down. That court said, in *Neuling v. Commonwealth*, 98 Penn. St., 322: "The learned judge then proceeded to say that the doubt must be a reasonable one, and that jurymen could not doubt as jurymen what they believed as men. In all this there was no error. It is the familiar language found in the text-books and decisions which treat of the subject."

By the twelfth and thirteenth instructions, considered in connection with the eleventh instruction for the state, and also in connection with the definitions of reasonable doubt as embodied in the instructions given for the defense, we think the law upon this subject was correctly presented to the jury.

The statute of this state provides that "Juries in all criminal cases shall be judges of the law and fact." Instruction No. 13½, given for the prosecution, is objected to as improperly limiting and qualifying this provision of the statute. It tells the jury that "if they can say upon their oaths that they know the law better than the court itself, they have the right to do so;" . . . but that, "before saying this upon their oaths, it is their duty to reflect whether from their study and experience they are better qualified to judge of the law than the court," etc.

The language of instruction No. 13½ is an exact copy, *verbatim et literatim*, of the language used by this court in *Schnier v. The People*, 23 Ill., 17. The views expressed in *Schnier v. The People* have been approved of and indorsed in *Fischer v. The People*, 23 Ill., 283; *Mullinix v. The People*, 76 Ill., 211, and *Davison v. The People*, 90 Ill., 221. The question is settled, and we see no reason to retreat from our position upon this subject.

It is also claimed that the court erred in refusing to give certain instructions asked by the defendants. The refusal of refused instructions numbered 3, 8, 9, 11 and 18 is especially insisted upon as error.

Instruction No. 3 was properly refused because it told the jury that those of the defendants who were not *present at the Hay-market*, counseling, aiding and abetting the throwing of the bomb, should be acquitted. Under our statute and the decision of this court in *Brennan v. The People*, 15 Ill., 517, the

defendants were guilty if they advised and encouraged the murder to be committed although they may not have been present.

Instruction No. 8 was wrong for a number of reasons, but it is sufficient to refer to one; it assumes that "a conspiracy to bring about a change of government . . . by peaceful means if possible, but if necessary to resort to *force* for that purpose," is not unlawful. The fact that the conspirators may not have intended to resort to force, unless, in their judgment, they should deem it necessary to do so, would not make their conspiracy any the less unlawful.

All that was material in instructions 9, 11 and 18 was embodied in the instructions which were given for the defendants.

The defendants also complain that the court refused to give an instruction for them which contained the following statement: "It cannot be material in this case that defendants, or some of them, are or may be socialists, communists or anarchists," etc.

If there was a conspiracy, it was material to show its purposes and objects with a view of determining whether and in what respects it was unlawful. Anarchy is the absence of government; it is a state of society where there is no law or supreme power. If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical anarchy. Whether or not the defendants were anarchists may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it. Therefore, we cannot say that it was an error to refuse an instruction containing such a broad declaration as that announced in the above quotation.

Defendants further complain because the instruction, numbered 13, which was asked by them, was refused by the trial court. The refusal of this instruction was not error.

It was proper enough, so far as it stated that, if a person at the Hay-market, "without the knowledge, aid, counsel, pro-

curement or abetting of the defendants or any of them, then or theretofore given. . . . throw a bomb among the police, whereupon resulted the murder charged in the indictment, then the defendants would not be liable for the results of such bomb," etc. But the instruction is so ingeniously worded as to lead the jury to believe that the person who threw the bomb at the Hay-market was justified in doing so, if the meeting there was lawfully convened and peaceably conducted, and if the order to disperse was unauthorized and illegal. Counsel inject into the instruction the hypothesis that the bomb may have been thrown by an outside party "in pursuance of his view of the right of self-defense." A mere order to disperse cannot be an excuse for throwing a dynamite bomb into a body of policemen. If the bomb-thrower had been illegally and improperly attacked by the police, while quietly attending a peaceable meeting, and had thrown the bomb to defend himself against such attack, another question would be presented. The vice of the instruction lies in the insidious intimation embodied in it, that, when a body of policemen, even if in excess of their authority, give a verbal order to an assemblage to disperse, a member of that assembly will be excusable for throwing a bomb on the ground of self-defense and because of the supposed invasion of his rights.

The instruction given by the court of its own motion, and which has already been referred to, is also claimed to be erroneous. So far as it speaks of murder and advice to commit murder in general terms, it is sufficiently limited and qualified when read in connection with all the other instructions to which it specifically calls attention. It does not supersede and stand as a substitute for the other instructions, given for both sides. It does not so purport upon its face. On the contrary, the jury are directed to "carefully scrutinize" such other instructions, and are told that their apparent inconsistencies will disappear under such scrutiny. In the last sentence they are requested to disregard any unguarded expressions that may have crept into the instructions "which seem to assume the existence of any facts," and look only to the evidence, etc. Why caution the jury to disregard certain expressions of a particular kind in the other instructions, if the latter were to be entirely superseded? We do not think that the instruction

given by the trial judge *suo motu* is obnoxious to the objections urged against it.

Defendants also object to the instruction as to the form of the verdict as being erroneous. It is claimed that the jury were obliged under this instruction to find the defendants either guilty or not guilty of murder, whereas the jury were entitled to find that the offense was a lower grade of homicide than murder, if the evidence so warranted. This position is fully answered by our decisions in the cases of *Dunn v. The People*, 109 Ill., 646, and *Dacey v. The People*, 116 Ill., 55.

If counsel desired to have the jury differently instructed as to the form of the verdict, they should have prepared an instruction indicating such form as they deemed to be correct, and should have asked the trial court to give it. They did not do so, and are in no position to complain here.

The court, at the request of the defendants, did give the jury an instruction, defining manslaughter in the words of the statute, and specifying the punishment therefor as fixed by the statute. The court also gave the jury the following instruction: "The jury are instructed that under an indictment for murder a party accused may be found guilty of manslaughter; and in this case, if, from a full and careful consideration of all the evidence before you, you believe beyond a reasonable doubt that the defendants or any of them are guilty of manslaughter, you may so find by your verdict."

The next error assigned has reference to the impaneling of the jury. The counsel for plaintiffs in error have made an able and elaborate argument for the purpose of showing that the jury which tried this case was not an *impartial* jury in the sense in which the word "impartial" is used in our constitution. We do not deem a consideration of all the points presented as necessary to a determination of the case, and shall notice only those that seem to us to be material.

Nine hundred and eighty-one men were called into the jury-box and sworn to answer questions. Each one of the eight defendants was entitled to a peremptory challenge of twenty jurors, making the whole number of peremptory challenges allowed to the defense one hundred and sixty. The state was entitled to the same number. Seven hundred and fifty-seven were excused upon challenge for cause. One hundred and

sixty were challenged peremptorily by the defense and fifty-two by the state.

Of the twelve jurors who tried the case, eleven were accepted by the defendants. They challenged one of these, whose name was Denker, for cause, but, after the court overruled the challenge, they proceeded to further question him, and finally accepted him, although one hundred and forty-two of their peremptory challenges were at that time unused. They accepted the ten others, including the juror Adams, without objection. When Adams, the eleventh juror, was taken, they had forty-three peremptory challenges which they had not yet used.

Therefore, as to eleven of the jurymen, the defendants are estopped from complaining. They virtually agreed to be tried by them because they accepted them, when, by the exercise of their unused peremptory challenges, they could have compelled every one of them to stand aside.

Counsel for the defendants complain that the trial court overruled their challenges for cause of twenty-six talesmen, to whose examinations they specifically call our attention. As they afterwards peremptorily challenged the talesmen so referred to, no one of them sat upon the jury. Every one of these twenty-six men had been peremptorily challenged before the eleventh juror was taken.

After the eleventh juror was accepted, the forty-three peremptory challenges which then remained to the defendants were all used by them before the twelfth juror was taken.

After the defendants had examined the twelfth juror, whose name was Sanford, they challenged him for cause. Their challenge was overruled and they excepted.

The one hundred and sixty talesmen who were peremptorily challenged by defendants were first challenged for cause, and the challenges for cause were overruled by the trial court.

It is claimed that, inasmuch as the defendants exhausted all their peremptory challenges before the panel was finally completed, the action of the court in regard to these particular jurors will be considered, and if erroneous such action is good ground of reversal. We think it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges. "Unless objection is shown to one or more of the jury who *tried* the case, the

antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and stood aside will not be inquired into in this court." *Holt v. State*, 9 Texas Ct. App., 571.

We cannot reverse this judgment for errors committed in the lower court in overruling challenges for cause to jurors, even though defendants exhausted their peremptory challenges, unless it is further shown that an objectionable juror was forced upon them and sat upon the case after they had exhausted their peremptory challenges. This doctrine is ably discussed in *Loggins v. The State*, 12 Texas Ct. App., 65. We think the reasoning in that case is sound and answers the objection here made.

In addition to this reason, we have carefully considered the examinations of the several jurors challenged by the defendants peremptorily, and while we cannot approve all that was said by the trial judge in respect to some of them, we find no such error in the rulings of the court in overruling the challenges for cause as to any of them as would justify a reversal of the cause. The examinations, as they appear in the record, of the forty-three talesmen who were challenged peremptorily after the eleventh juror was accepted, show that many of the forty-three challenges were exercised arbitrarily and without any apparent cause. Such challenges were not compelled by any demonstrated unfitness of the jurors, but seem to have been used up for no other purpose than to force the selection of one juror, after the forty-three challenges were exhausted. The only question, then, which we deem it material to consider is: Did the trial court err in overruling the challenge for cause of Sanford, the twelfth juror, or, in other words, was he a competent juror?

The following is the material portion of his examination:

"Have you an opinion as to whether or not there was an offense committed at the Hay-market meeting by the throwing of the bomb? A. Yes. Q. Now, from all that you have read and all that you have heard, have you an opinion as to the guilt or innocence of any of the eight defendants of the throwing of that bomb? A. Yes. Q. You have an opinion upon that question also? A. I have. . . . Now if you should be selected as a juror in this case to try and de-

termine it, do you believe that you could exercise legally the duties of a juror, that you could listen to the testimony and all of the testimony and the charge of the court, and, after deliberation, return a verdict which would be right and fair as between the defendants and the people of the state of Illinois? A. Yes, sir. Q. You believe that you could do that? A. Yes, sir. Q. You could fairly and impartially listen to the testimony that is introduced here? A. Yes. Q. And the charge of the court, and render an impartial verdict, you believe? A. Yes. Q. Have you any knowledge of the principles contended for by socialists, communists and anarchists? A. Nothing except what I read in the papers. Q. Just general reading? A. Yes. Q. You are not a socialist, I presume, or a communist? A. No, sir. Q. Have you a prejudice against them from what you have read in the papers? A. Decided. Q. Do you believe that that would influence your verdict in this case, or would you try the real issue which is here as to whether these defendants were guilty of the murder of Mr. Degan or not, or would you try the question of socialism and anarchism, which really has nothing to do with the case? A. Well, as I know so little about it in reality at present, it is a pretty hard question to answer. Q. You would undertake, you would attempt, of course, to try the case upon the evidence introduced here, upon the issue which is presented here? A. Yes, sir. . . . Q. Well, then, so far as that is concerned, I do not care what your opinion may be now, for your opinion now is made up of random conversations and from newspaper reading, as I understand? A. Yes. Q. That is nothing reliable. You do not regard that as being in the nature of sworn testimony at all, do you? A. No. Q. Now, when the testimony is introduced here, and the witnesses are examined, you see them and look into their countenances, judge who are worthy of belief and who are not worthy of belief,—don't you think then you would be able to determine the question? A. Yes. Q. Regardless of any impression that you might have, or any opinion? A. Yes. Q. Have you any opposition to the organization by laboring men of associations or societies or unions, so far as they have reference to their own advancement and protection and are not in violation of law? A. No, sir. Q. Do you know any of the members of the police force of the city of Chicago?

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A. Not one by name. Q. You are not acquainted with any one that was either injured or killed, I suppose, at the Hay-market meeting? A. No. . . . Q. If you should be selected as a juror in this case, do you believe that, regardless of all prejudice or opinion which you now have, you could listen to the legitimate testimony introduced in court, and upon that, and that alone, render and return a fair and impartial, unprejudiced and unbiased verdict? A. Yes."

The foregoing examination was by the defense. The following was by the state:

"Q. Upon what is your opinion founded—upon newspaper reports? A. Well, it is founded on the general theory, and what I read in the newspapers. Q. And what you read in the papers? A. Yes, sir. Q. Have you ever talked with any one that was present at the Hay-market at the time the bomb was thrown? A. No, sir. Q. Have you ever talked with any one who professed of his own knowledge to know anything about the connection of the defendant with the throwing of that bomb? A. No. Q. Have you ever said to any one whether or not you believed the statements of facts in the newspapers to be true? A. I have never expressed it exactly in that way, but, still, I have no reason to think they were false. Q. Well, the question is not what your opinion of that was. The question simply is—it is a question made necessary by our statute, perhaps? A. Well, I don't recall whether I have or not. Q. So far as you know, then, you never have? A. No, sir. Q. Do you believe that, if taken as a juror, you can try this case fairly and impartially and render a verdict upon the law and evidence? A. Yes."

It is objected that Sanford had formed such an opinion as disqualified him from sitting upon the jury.

It is apparent from the foregoing examination that the opinion of the juror was based upon rumor or newspaper statements, and that he had expressed no opinion as to the truth of such rumors or statements. He stated upon oath that he believed he could fairly and impartially render a verdict in the case in accordance with the law and evidence. That the trial court was satisfied of the truth of his statements would appear from the fact that the challenge for cause was overruled.

Therefore, the examination of the juror shows a state of facts

which brings his case exactly within the scope and meaning of the third proviso of the fourteenth section of chapter 78, entitled "Jurors," of our Revised Statutes. That proviso is as follows: "*And provided further*, that in the trial of any criminal cause the fact that a person called as a juror has formed an opinion or impression based upon rumor or newspaper statements (about the truth of which he has expressed no opinion) shall not disqualify him to serve as a juror in such case if he shall, upon oath, state that he believes he can fairly and impartially render a verdict therein in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement."

In *Wilson v. The People*, 94 Ill., 299, one William Gray was examined touching his qualifications as a juror, and said: "I have read newspaper accounts of the commission of the crime with which the defendant is charged, and have also conversed with several persons in regard to it since coming to Carthage and during my attendance upon this term of court; do not know whether they are witnesses in the case or not; do not know who the witnesses in the case are. From accounts I have read, and from conversations I have had, I have formed an opinion in the case; would have an opinion now if the facts should turn out as I have heard them, and I think it would take some evidence to remove that opinion; would be governed by the evidence in the case, and can give the defendant a fair and impartial trial according to the law and the evidence." Gray was challenged for cause, and the challenge overruled by the trial court. We held "that all objection to Gray's competency was clearly removed by the proviso above quoted." We also there said, "The opinion formed seems not to have been decided, but one of a light and transient character, which, at no time, would have disqualified the juror from serving."

The expressions of Sanford in the case at bar as to the opinion formed by him are not so strong as those used by Gray in the *Wilson* case in regard to his opinion. Sanford's impressions were not such as would refuse to yield to the testimony that might be offered, nor were they such as to close his mind to a fair consideration of the testimony. They were not "strong and deep impressions," such as are referred to by Chief Justice Marshall when he said, upon the trial of Aaron Burr

for treason, "Those strong and deep impressions which will close the mind against the testimony which may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to a juror." 1 Burr Trial, 416.

Counsel for the defense seem to claim in their argument that the proviso above quoted is unconstitutional, in that it violates section 9 of article 2 of the present constitution of this state, which guaranties to the accused party in every criminal prosecution "a speedy public trial by an *impartial jury* of the county or district in which the offense is alleged to have been committed." We do not think that the proviso is unconstitutional for the reason stated. The rule which it lays down, when wisely applied, does not lead to the selection of partial jurors. On the contrary, it tends to secure intelligence in the jury box, and to exclude from it that dense ignorance which has often subjected the jury system to just criticism. A statute upon this subject similar to ours, and attacked as unconstitutional for the same reason here indicated, was held to be constitutional by the court of appeals in the state of New York in *Stokes v. The People*, 53 N. Y., 171.

The juror Sanford further stated that he had a prejudice against socialists, communists and anarchists. This did not disqualify him from sitting as a juror. If the theories of the anarchists should be carried into practical effect, they would involve the destruction of all law and government. Law and government cannot be abolished without revolution, bloodshed and murder. The socialist or communist, if he attempted to put into practical operation his doctrine of community of property, would destroy individual rights in property. Practically considered, the idea of taking a man's property from him without his consent for the purpose of putting it into a common fund for the benefit of the community at large, involves the commission of theft and robbery. Therefore, the prejudice which the ordinary citizen, who looks at things from a practical stand-point, would have against anarchism and communism, would be nothing more than a prejudice against crime.

In *Winneshiek Insurance Company v. Schueller*, 60 Ill., 465, we said "a man may have a prejudice against crime, against a mean action, against dishonesty, and still be a competent

juror. This is proper, and such prejudice will never force a jury to prejudge an innocent and honest man." In *Robinson et al. v. Randall*, *supra*, we again said: "The mere fact, therefore, that a juror may have a prejudice against crime does not disqualify him as a juror. A juror may be prejudiced against larceny or burglary or murder, and yet such fact would not in the least disqualify him from sitting upon a jury to try some person who might be charged with one of these crimes."

Sanford stated that he would "attempt to try the case upon the evidence introduced here, upon the issue which is presented here." The issue presented was whether the defendants were guilty or not guilty of the murder of Matthias J. Degan. Any prejudice against communism or anarchism would not render a juror incapable of trying that issue fairly and impartially.

We cannot see that the trial court erred in overruling the challenge for cause of the twelfth juror. This being so, it does not appear that the defendants were injured or that their rights were in any way prejudiced by his selection as a juror.

On the motion for a new trial the defendants read three affidavits for the purpose of showing that shortly after May 4, 1886, two of the jurors had given utterance to expressions showing prejudice against the defendants. The two jurors made counter-affidavits denying that they used the expressions attributed to them.

We do not think that the affidavits satisfactorily proved previously expressed opinions on the part of the jurors referred to. It is a dangerous practice to allow verdicts to be set aside upon *ex parte* affidavits as to what jurors are claimed to have said before they were summoned to act as jurymen. The parties making such affidavits submit to no cross-examination, and the correctness of their statements is subject to no test whatever. We adhere to the views which we have recently expressed upon this subject in the case of *Hughes v. The People*, 116 Ill., 230.

The defendants claim that, although they were entitled to one hundred and sixty peremptory challenges, yet the state was entitled to only twenty. And they charge it as error that the state was allowed to peremptorily challenge more than twenty talesmen. The statute says: "The attorney prosecut-

ing on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to." R. S., ch. 38, sec. 432. We cannot conceive how language can be plainer than that here used; it explains itself and requires no further remark.

The defendants also claim that the trial court erred in refusing a separate trial from the other defendants to the defendants Spies, Schwab, Fielden, Neebe and Parsons. Error cannot be assigned upon the refusal to grant separate trials where several are jointly indicted. It was a matter of discretion with the court below. We so decided in *Muton et al. v. The People*, 15 Ill., 536. We are unable to see any abuse of the discretion in this case. Defendants also take exceptions to the conduct of the special bailiff. The regular panel having been exhausted, and the defendants having objected "to the sheriff summoning a sufficient number of persons to fill the panel" of jurors, the court appointed a special bailiff, named Ryce, to summon such persons under section 13, chapter 73, Revised Statutes. On the motion for new trial defendants read the affidavit of one Stevens, in which Stevens swore that he had heard one Favor say that he (Favor) had heard Ryce say that he (Ryce) was summoning as jurors such men as the defense would be compelled to challenge peremptorily, etc. The defendants then made a motion, based upon this affidavit, that Favor be compelled to come before the court and testify to what Ryce had said to him. The refusal of the court to grant the application is complained of as error.

The statements in the affidavit were mere hearsay and were too indefinite and remote to base any motion upon. Moreover, if Ryce did make the remark in question to Favor, it does not appear that defendants were harmed by it. There is nothing to show that Ryce made any remarks of any kind, proper or improper, to the jurors whom he summoned.

In addition to this, it is not shown that the defendants served Favor with a subpoena so as to lay a foundation for compelling his attendance.

We think that the course pursued on the trial in regard to the manner of impaneling the jury was correct and in accordance with the plain meaning of section 21, chapter 78, of Revised Statutes. That section says "that the jury shall be passed

upon and accepted in panels of four by the parties, commencing with the plaintiff." The state is not called upon to tender the defendants a second panel before the defendants tender it back four.

We cannot see that the remarks of the state's attorney in his argument to the jury were marked by any such improprieties as require a reversal of the judgment. *Wilson v. The People*, *supra*, and *Garrity v. The People*, 107 Ill., 168.

In their lengthy argument, counsel for the defense make some other points of minor importance, which are not here noticed. As to these it is sufficient to say that we have considered them and do not regard them as well taken.

The judgment of the criminal court of Cook county is affirmed.

JUSTICE MULKEY. As it is not my intention to file a separate opinion, as I should have done had health permitted, I desire to avail myself of this occasion to say from the bench that, while I concur in the conclusion reached, and also in the general view presented in the opinion filed, I do not wish to be understood as holding that the record is free from error, for I do not think it is. I am, nevertheless, of opinion that none of the errors complained of are of so serious a character as to require a reversal of the judgment.

In view of the number of defendants on trial, the great length of time it was in progress, the vast amount of testimony offered and passed upon by the court, and the almost numberless rulings the court was required to make, the wonder with me is that the errors were not more numerous and more serious than they are.

In short, after having carefully examined the record and given all the questions arising upon it my very best thought, with an earnest and conscientious desire to faithfully discharge my whole duty, I am fully satisfied that the conclusion reached vindicates the law, does complete justice between the prisoners and the state, and that it is fully warranted by the law and the evidence.

THE CHIEF JUSTICE. In this case the court orders that the sentence of the criminal court of Cook county on the defend-

ants in the indictment — August Spies, Michael Schwab, Samuel Fielden, Albert R. Parsons, Adolph Fischer, George Engel and Louis Lingg — be carried into effect by the sheriff of Cook county on Friday, the 11th day of November, between the hours of 10 o'clock in the forenoon and 4 in the afternoon of that day.



INDEX.

ABDUCTION.

1. To convict of abduction under section 282 of the Penal Code of New York, as amended by section 2, chapter 46, Laws of New York of 1884, not only must a "taking" be shown, but also that such taking was for the purpose of prostitution. The evidence corroborating that of the abducted female must tend to prove each of the facts constituting the crime. *People v. Plath*, 1.
2. And where the female, of her own free will, left her home and voluntarily entered defendant's concert saloon, and remained there a month, defendant not being previously acquainted with her, or having knowledge of her name or family, and no evidence having been given to corroborate her testimony, except that on being asked about her, defendant denied any knowledge of a girl by the name inquired for, and that he kept a disorderly house, such does not constitute the offense intended by section 282 of the Penal Code. *Id.*
3. This section does not constitute the employment of a female, under the age of sixteen years, for immoral purposes, a criminal offense, unless it is accompanied with the taking of her person by some active agency for such purpose. *Id.*

ABORTION.

1. Death resulting from criminal abortion is not a necessary element in the offense, but fixes the degree of the punishment. *Railing v. Com.*, 7.
2. The competency of dying declarations is restricted to those cases in which the death is the subject of the charge; they are consequently inadmissible under an indictment for abortion. *Id.* (See note.)
3. Where an indictment charged an abortion by means of powders, it is not error for the court to charge that the abortion would be criminal if procured by an instrument, with criminal intent. *Id.*
4. In an indictment for murder the killing must be charged as done with malice aforethought. *State v. Thurman*, 16.
5. When drugs are administered and instruments thrust into the body of deceased with the specific intent to produce an abortion, these acts imply malice. *Id.*

ACCESSORIES BEFORE THE FACT AND PRINCIPALS.

THE ANARCHIST CONSPIRACY MURDER CASE.—While it is conceded that no one of the defendants threw the bomb with his own hand which caused the death of officer Degan, the statute of Illinois abolishes the distinction between accessories before the fact and principals and under it all accessories before the fact are made principals. If, therefore, the defendants advised, encouraged, aided or abetted the killing of Degan, they are as guilty as though they took his life with their own hands. *Spies et al. v. The People*, 570.

ADMISSIONS AND CONFESSIONS.

ADMISSIONS OF CO-DEFENDANT.—Statements made to a witness by one of two defendants to an indictment for burglary, while the other co-defendant is under arrest, are admissible against them. *Smith v. The People*, 80.

See EVIDENCE, 7. Also the Anarchist Conspiracy Murder Case, *Spies v. The People*, 570.

ADULTERY.

1. INDICTMENT.—In an indictment under section 208 of the Criminal Code of Nebraska, against a husband, for deserting his wife and living and cohabiting with another woman in a state of adultery, the offense must be alleged substantially in the language of the statute. *Lord v. The State*, 17.
2. WITNESS—WIFE COMPETENT.—The wife *held* to be a competent witness against her husband on his trial upon an indictment for adultery, under a statute permitting a husband or wife to testify in a criminal proceeding for a crime committed by one against the other. *Id.*
3. MARRIAGE—EVIDENCE.—Marriage may be proved by an eye-witness, and if followed by cohabitation its validity will be presumed. *Id.*

AIDING PARTY UNDER ARREST TO ESCAPE.

1. AIDING ESCAPE OF PARTY UNDER ARREST.—An information for aiding a party under arrest to escape need not allege that the respondent had knowledge of the arrest, or that the party was in custody, or that respondent did the act charged with an intent to aid the escape. *People v. Murray et al.*, 31.
2. Charging the offense laid in the information substantially in the language of the statute, accompanying it with a statement of the facts upon which it arose, is sufficient. *Id.*

ALIBI.

1. BURDEN OF PROOF IN ALIBI.—When defendant introduces testimony tending to prove an *alibi*, the burden of proof to establish the same does not shift, and if upon all the evidence, including that for and against the *alibi*, there remains in the mind of the jurors a reasonable doubt as to the defendant's guilt, they must acquit. *McLain v. The State*, 21. (See note.) *The State v. McCracken*, 209.
2. SAME—CONTRADICTING DEFENDANT.—Where the accused testifies as to his being in another city on the night of the burglary and is interrogated as to seeing a procession there that night, the appearance of such procession may be shown by another witness in order to contradict him. *People v. Gibson*, 85.

APPEAL.

See PRESUMPTIONS, 2.

ARREST.

See AIDING PARTY UNDER ARREST TO ESCAPE.

ARREST OF JUDGMENT.

See PRACTICE, 9.

ARSON.

IN AN INDICTMENT FOR ARSON it is not necessary to charge the house was set on fire with malice aforethought, but merely "willfully and maliciously," nor does it vitiate the indictment that the copulative is used when the statute has willfully or maliciously. *State v. Price*, 33.

ASSAULT.

1. WHAT CONSTITUTES ASSAULT.—Presenting and aiming an unloaded gun at a person within shooting distance, in such manner as to terrify him, he not knowing that the gun is not loaded, will not support a conviction for a criminal assault, although it may support a civil action for damages. *Chapman v. The State*, 37.
2. ASSAULT OF OFFICER—INDICTMENT.—An indictment under the Code (Oregon), § 677, for assaulting an officer with a deadly weapon, must set out that the accused knew that the person assaulted was an officer. *State v. Smith*, 43.
3. ASSAULT WITH A DANGEROUS WEAPON. *State v. Amadon*, 41. (See note.)
4. INFORMATIONS—ASSAULT WITH INTENT TO KILL.—The act "to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges," which took effect June 10, 1885, of the state of Nebraska, applies to all cases where grand juries were required after the act took effect. *Jones v. The State*, 45.
5. ASSAULT WITH INTENT TO RAPE—FRAUD AND THREATS.—To warrant a conviction under an indictment for an assault and battery with intent to commit rape, the state must prove the actual or attempted use of force. Fraud and threats have no part in such an offense under the Penal Code of Texas. *Burney v. The State*, 49.
6. ASSAULT WITH INTENT TO ROB.—Direct and positive evidence of a felonious intent is not necessary in a prosecution for assault and battery, for if there is even a scintilla of evidence to that effect, the supreme court will not reverse on the ground that such evidence is indirect and unsatisfactory. *Pudgett v. The State*, 51.

ATTEMPT TO COMMIT BURGLARY.

INFORMATION FOR ATTEMPT TO COMMIT BURGLARY—OFFENSE, HOW CHARGED.
An information for an attempt to commit burglary, a statutory offense, which charges the offense in the language of the statute, is sufficient. *People v. Murray et al.*, 54.

BAIL.

1. BAIL AFTER VERDICT, WHEN ALLOWABLE—"CONVICTION," IN STATUTE, CONSTRUED.—A defendant convicted of felony in a case not punishable with death is not, under the California statute (sec. 1271, Penal Code), entitled, as a matter of right, to be admitted to bail after conviction, bail being allowable in such cases only as a matter of discretion. The word "conviction," as used, signifies a finding by the jury of a verdict that the accused is guilty. *Ex parte Brown*, 55.
2. TAKEN BY SHERIFF IN EXCESS OF AMOUNT DIRECTED BY COURT, VOID.—Where the district court directs bail to be taken in the penalty of \$1,200, and the sheriff requires and accepts from the principal and his sureties a bond in the sum of \$1,350, the bond is utterly void, as the sheriff is only authorized to require bail in such an amount as is directed by the court. *Roberts et al. v. The State*, 61. (See note.)

BASTARDY.

1. **IMPRISONMENT FOR DEBT.**—The provision of the constitution declaring that "no person shall be imprisoned for debt except in cases of fraud" applies only to liabilities arising upon contract. *In re Wheeler*, 70.
2. **BASTARDY — OBJECT OF PROSECUTION.**—The purpose of a proceeding in bastardy is to compel the father of the illegitimate child to assist in supporting the fruit of his immoral act, and to indemnify the public against the burden of supporting the child. *Id.* (See note.)
3. **IMPRISONMENT TO ENFORCE JUDGMENT FOR MAINTENANCE OF CHILD.**—The charge of maintenance and education which the father of an illegitimate child may be adjudged to pay under the bastardy act is not a debt in the sense in which that term is used in the provision of the constitution forbidding imprisonment for debt. *Id.*
4. **STATUTE NOT UNCONSTITUTIONAL.**—That portion of the act which provides that the defendant, if he be in custody, shall be required to secure the payment of the judgment rendered against him by good and sufficient securities, and, in case of default, that he shall be committed to jail until the security is given, is not in conflict with section 16 of article 2 of the constitution. *Id.*
5. **EVIDENCE — LIKENESS OF CHILD TO DEFENDANT.**—In bastardy proceedings the bastard child may not be exhibited to the jury for the purpose of showing, by its likeness to the defendant, its paternity. *Hanawalt v. The State*, 65.

IMPROPER COMMENTS BY COUNSEL, see PRACTICE, 7, 8.

BILL OF EXCEPTIONS.

1. All objectionable rulings of the trial court must be excepted to at the time, and made part of the bill of exceptions, or no error can be predicated on them on appeal. *The State v. Reed*, 76. (See note.)
2. The motion for a new trial must also be made part of the bill of exceptions; otherwise, no question can be raised on appeal as to misdirecting the jury. *Id.*
3. **OBJECTIONS TO TESTIMONY** must be made when offered. *State v. Price*, 33.

BURGLARY.

1. **STOLEN GOODS — POSSESSION — EVIDENCE IN CASE OF BURGLARY.**—Possession of property recently stolen is *prima facie* proof that the person in possession committed larceny; and where both larceny and burglary are committed at the same time, the possession of such goods is also *prima facie* proof that the possessor committed the burglary. *Smith v. The People*, 80. (See note.)
2. **BURGLARY — BREAKING INTO HOUSE TWICE — DAYLIGHT — NIGHT-TIME.**—Where parties break into a house in the night-time with intent to steal, and carry off a small part of the property therein, and subsequently return and re-enter in the night-time and carry off the balance, it will be considered a continuous burglary; and that it was daylight when the balance of the property was taken away will not affect the case. *People v. Gibson*, 85.
3. **BURGLARY — EVIDENCE ON SEPARATE TRIAL OF ONE OF SEVERAL DEFENDANTS.**—Evidence of the acts and conversation of other parties indicted with defendant for burglary, tending to show that defendant and such parties were associates and confederates for the commission of the crime, and tending to connect defendant with its commission, are admissible on the separate trial of defendant. *The State v. Stevens*, 88.

4. **INDICTMENT.**— Under the laws of Missouri (R. S., § 1298), an indictment for burglary of or larceny from a railway depot need not allege the incorporation of the railway company, nor its ownership of the depot building. *The State v. Shields*, 98.
5. **DEGREES OF OFFENSE — INFORMATION — NEGATIVE WORDS.**— It is not incumbent on the state, in charging an offense under Revised Statutes of Wisconsin, 1878, section 4409, to allege the negative provided for in said section, and contained in the language "not adjoining or occupied with a dwelling-house." *The State v. Kane et al.*, 99.
6. **DESCRIPTION OF OFFENSE — SENTENCE.**— Said language, though a material part of the description of the offense provided against in Revised Statutes 1878, section 4409, need not be alleged in the information; and where such language is omitted, and the accused found guilty, the court may sentence him. *Id.*
7. **VALUE OF GOODS.**— In an information for burglary the value of the goods which the accused intended to steal need not be alleged. *Id.*
8. **EVIDENCE OF OWNERSHIP OF BUILDING — VARIANCE.**— In a prosecution for burglary, committed in attempting to enter the house of H. Wempe, with intent to commit larceny, if on the trial G. Wempe testifies that his father owned the house, without giving evidence as to the first name or initial of the owner, it is competent for the jury to presume from such testimony that the name of witness' father is H. Wempe. *People v. McGilver*, 106.
9. **EVIDENCE OF OTHER BURGLARY.**— In a prosecution for burglary evidence is admissible to show that at the time of arrest the defendants were attempting another burglary. *Id.* (See note.)
10. **BURGLARY AND LARCENY — PROOF OF PRIOR CONVICTION OF PETIT LARCENY.**— Where the defendant was charged in the information with burglary, and a prior conviction of petit larceny, and was convicted of burglary in the first degree, but was allowed to plead guilty to the charge of prior conviction without evidence or verdict thereon, and was thereon sentenced to fifteen years' imprisonment, there is no error, as the defendant might have been sentenced to such imprisonment without consideration of the charge of petit larceny. *People v. Neason*, 510.
11. **WHAT IS A DWELLING-HOUSE.**— Under the laws of Missouri (Revision 1879, § 1309) an under-ground cellar, used for storing ice and beer, having no internal door of communication with the living-rooms in the upper stories of the same building, and not under the control and dominion of any occupant of the building, is not a "dwelling-house." *State v. Clark*, 91.

CONCEALED WEAPONS.

See COSTS.

CONCEALING STOLEN GOODS.

See INDICTMENT, 14.

CONFESSIONS.

See EVIDENCE, 7.

CONSPIRACY.

1. **FORM OF INFORMATION FOR CONSPIRACY.**— An information for a conspiracy need not be against conspirators jointly, and is therefore not insufficient because it is against a single individual. *People v. Richards*, 112. (See note.)

2. CONSPIRACY TO ROB.—A conspiracy to compel a person to sign his bank check, and then to take it forcibly from him, constitutes a conspiracy to rob. *Id.*
3. CONSPIRACY DEFINED.—A conspiracy may be defined in general terms as a combination of two or more persons by some concerted action to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means. It is not necessary, however, that the accused should have been an original contriver of the mischief, for he may become a partaker in it by joining the others while it is being executed. If he concur, no proof of agreement to concur is necessary. As soon as the union of wills for the unlawful purpose is perfected the offense of conspiracy is complete. This joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from the other facts proved: in other words, may be established by circumstantial evidence. *Spies et al. v. The People*, 570. (The Anarchist Conspiracy Murder Case.)
4. See this case as to when the acts and declarations of conspirators are admissible in evidence. *Id.*

CONSTITUTIONAL LAW.

1. INDICTMENT—JURISDICTIONAL.—The declaration of article V of the amendments to the constitution, that "no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury," is jurisdictional, and no court of the United States has authority to try a prisoner in such cases without indictment or presentment by a grand jury, duly impaneled, describing an offense against the law for which the party charged may be punished. *Ex parte Bain*, 122.
2. NO AMENDMENT THERE"O BY COURT OR PROSECUTOR.—When this indictment is filed with the court no change can be made in the body of the instrument by order of the court, or by the prosecuting attorney, without a resubmission of the case to the grand jury. And the fact that the court may deem the change immaterial, as striking out of surplus words, makes no difference. *Id.*
3. THIS IS THE RULE AT COMMON LAW, AND IS THE REQUIREMENT OF THE CONSTITUTION.—This was the doctrine of the English courts under the common law. It is the uniform ruling of the American courts, except where statutes prescribe a different rule, and it is the imperative requirement of the provision of the constitution above recited. *Id.*
4. SAME—TRIAL ON SUCH INDICTMENT VOID.—Upon an indictment so changed the court can proceed no farther. There is nothing to try. *Id.*
5. SAME—PRISONER CONVICTED ON, DISCHARGED ON HABEAS CORPUS.—According to principles long settled in this court the prisoner who stands sentenced to the penitentiary on such trial is entitled to his discharge by writ of *habeas corpus*. *Id.*
6. HABITUAL CRIMINAL'S ACT CONSTITUTIONAL.—The act of 1883, providing increased penalties for second and subsequent offenses of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, is not unconstitutional, either as visiting penalties disproportioned to the offenses under constitution of 1870 of Illinois or as placing the defendant in jeopardy a second time for the same offense. *Kelley v. The People*, 135.
7. WAIVER OF JURY TRIAL—CONSTITUTIONALITY OF LAW.—The provisions in the statute (Laws Wis. 1881, ch. 197, § 8) creating the municipal court for Rock county, that "a jury trial in said court in criminal cases, begun by information, or not originally begun in said court, may

be waived by the accused in writing, or by consent in open court, entered on the minutes," is not unconstitutional. *In re Staff*, 140.

8. Where a party has waived his right to a jury trial under such statute, and has been convicted and sentenced to imprisonment, the legality of his confinement may be tested by *habeas corpus*. *Id.*
9. POLICE POWER.—PRIVATE PROPERTY.—All citizens of the state hold their property subject to such police regulation as the interest, health and safety of the people may demand, and no right of property can intervene to arrest the enforcement of penalties for the violation of the criminal statutes of the state. *Martin v. Blattner and another*, 148. (See note on POLICE POWER.)
10. Imprisonment for contempt of court is not servitude, and the law providing therefor is not in conflict with article 1, section 23, of the constitution of Iowa. *Id.*
11. Fines provided for violation of the prohibitory liquor law of Iowa are held not to be in conflict with article 1, section 17, of the constitution, nor in conflict with the fourteenth article of amendment to the constitution of the United States. *Id.* (Also *State v. O'Neil*, 319.)
12. A party tried for a criminal offense in the recorder's court of Kalamazoo is entitled to a jury of twelve men, and a conviction by a jury of six men will be quashed. That court is created a court of record and twelve is the constitutional jury except in courts of inferior jurisdiction. *People v. Luby*, 413.
13. IMPRISONMENT FOR DEBT under bastardy act, not unconstitutional. *In re Wheeler*, 70.
14. Statute cannot dispense with the statement in an indictment of the essential ingredient of a crime charged against an accused person. *Riggs v. The State*, 394.

CONTEMPT.

1. MISCONDUCT OF A JURYMAN.—A jurymen, during a recess upon a criminal trial, having proceeded, without the permission of the court, to the scene of the affray to acquaint himself with the locality, is not guilty of a criminal contempt for which he could be summarily punished by the court. *People ex rel. Mousell v. Court of Oyer and Terminer*, 163.
2. DISTINCTION BETWEEN CIVIL AND CRIMINAL CONTEMPTS.—A civil contempt may go beyond the statutory enumeration and include what was usual or permissible at common law; but a public or criminal contempt is precisely defined and barred in by the statute enumeration. *Id.* (See note.)

CONTINUANCE.

Motion for, see PRACTICE, 1, 2, 3, 4.

CORRUPTING WITNESSES.

1. ALLEGATIONS.—It is not necessary to allege that a witness in a judicial proceeding was sworn, recognized or subpoenaed in such judicial proceeding. *Chrisman v. The State*, 175.
2. EVIDENCE.—When such judicial proceeding involved a trial upon an indictment for a crime or misdemeanor, it was not error to admit in evidence, upon the trial of the case at bar, the said indictment, with the name of such witness attempted to be corrupted indorsed thereon as a witness, on the part of the state. *Id.*

COSTS.

1. IMPRISONMENT FOR COSTS.—There were three indictments against a prisoner, to one of which he pleaded guilty, and judgment was suspended on the payment of costs. He was found guilty on the other two, on one of which he was sentenced to imprisonment for ten days. After remaining in jail for the term of his imprisonment and twenty days additional, the prisoner took the oath prescribed for insolvent debtors and persons imprisoned for the costs and fine in a criminal prosecution and applied for his discharge. *Held*, that he was entitled to his discharge in all three cases. *State v. McNeely*, 110.
2. COSTS.—Where a defendant is prosecuted in separate counts for several violations of the prohibitory liquor law, and is found guilty under some of the counts and not guilty under the others, he should not be required to pay costs accruing under the counts upon which he is acquitted, but should recover costs. *State v. Brooks*, 299.

See ORDINANCE, 10.

COUNSEL.

See PRACTICE, 7, 8. EVIDENCE, 21.

DRUNKENNESS.

1. The law presumes that every one intends to produce the consequences that result from his acts, but this presumption is not conclusive, but only *prima facie* evidence of the intent. *State v. Barbee*, 178.
2. Where the defendant was indicted under section 1100 of the code (of North Carolina), for shooting at a train, with intent to injure it, and there was evidence tending to show that he was helplessly drunk at the time, the court properly left the question of intent to the jury, and it was for them to say whether the presumption had been rebutted. *Id.* (See note.)

DYING DECLARATIONS.

1. Death resulting from criminal abortion is not a necessary element in the offense, but fixes the degree of the punishment. *Railing v. Com.*, 7.
2. The competency of dying declarations is restricted to those cases in which the death is the subject of the charge; they are consequently inadmissible under an indictment for abortion. *Id.* (See note.)
3. DYING DECLARATION.—Proof of the circumstances under which a dying declaration was made, *held* sufficient to warrant the conclusion of the court that it was made under the conviction of impending death, and that it was admissible in evidence. *State v. Cantleng*, 418. (See note.)
4. DECLARATION IN WRITING, WHEN ADMISSIBLE.—Dying declarations in writing not inadmissible, although the facts were drawn out from the deceased and afterwards written down by another and read to the deceased, he assenting to the truth of the written statement. *Id.*

EMBEZZLEMENT.

1. TAX COLLECTOR AND HIS CLERK—THEIR RELATIONS.—Ferguson was back tax collector for the city of Louisville. Appellant was his clerk and cashier upon his employment. *Held*, that whatever moneys came into the hands of the principal or his clerk, in the discharge of their duties, came lawfully into the hands of both, and having the right to receive the money, appellant cannot be held to have committed a felony. *Snapp v. The Com.*, 183.

2. Where one comes into possession of money or property lawfully, he cannot become guilty of larceny by afterwards converting it to his own use. *Id.*
3. Appellant was not an officer of the city of Louisville; he was Ferguson's clerk, and bound to account to him alone. *Id.*
4. Although, where several felonies are parts of the same transaction, evidence of all is admissible on the trial of an indictment for one, yet the rule does not apply to a case like this, where a charge of larceny alleged to have been committed on one day is attempted to be established by proof of another larceny committed on a different day. *Id.*
5. Evidence of appellant's extravagant habits, or of expenditures beyond his salary, is incompetent. *Id.*

ERROR.

Failure to instruct, when not error. See INSTRUCTIONS, 6, 8. HABITUAL CRIMINAL'S ACT, 3. MANSLAUGHTER, 2. PRACTICE, 12. VERDICT, 1.

EVIDENCE.

1. PRIVILEGED COMMUNICATIONS — DECLARATION TO PHYSICIAN BY PRISONER.—Where a physician is sent to a prisoner after a crime has been committed, and she accepts his services professionally, disclosures made by her to him are privileged communications, and this rule applies to all actions, civil or criminal. *People v. Murphy*, 194.
2. OPINION DEDUCED FROM PRIVILEGED COMMUNICATIONS.—The opinion of such physician as to whether an abortion has been committed, founded partly on such statements, is also inadmissible. *Id.*
3. DECLARATIONS NARRATIVE OF A PAST OCCURRENCE.—Although the prisoner was a party to the crime (abortion), and relatively to it was an accomplice of the accused, and, so to speak, a co-conspirator with him, yet her declarations, narrative of a past occurrence, and constituting no part of the *res geste*, were not admissible. *Id.*
4. QUESTIONS TENDING TO DEGRADE WITNESS, HOW FAR ADMISSIBLE.—In a trial for murder, a witness for defense was asked on cross-examination this question: "State if you have ever been confined in Baltimore city jail?" The counsel for the prisoner objected, but the court overruled the objection and allowed the question. But the court instructed the witness that she was not obliged to answer the question, and she thereupon refused to answer. *Held:*
 1st. That in notifying the witness that she was not obliged to answer, the court was as liberal to her and to the accused as any recognized rule could require.
 2d. That there was no error in allowing the question to be put. *Smith v. The State*, 197.
5. NO CROSS-EXAMINATION AS TO COLLATERAL FACT.—It is not competent to cross-examine a witness as to any distinct collateral fact not brought out in the examination-in-chief, with the view of impeaching his testimony by introducing other witnesses to contradict him. *Crittenden v. The Com.*, 200.
6. SAME.—If a question as to such collateral fact be put to a witness with the intent to discredit his evidence, his answer must be taken as conclusive. No evidence can be adduced afterwards to contradict it. *Id.*
7. CONFESSIONS — ADMISSIBILITY OF.—Before confessions can go to the jury as evidence in a criminal case, it must be shown to the satisfaction of the court that they were made voluntarily. Any words spoken in the hearing of the defendant while in custody, which might generate hope or fear on his part, are sufficient to exclude his confessions

thereby induced; and when a confession has been thus improperly obtained, any subsequent repetition of it must also be excluded, unless it is affirmatively shown that the effect of the improper influence had been entirely removed. *Owen v. The State*, 206.

8. HUSBAND AND WIFE AS WITNESSES AGAINST EACH OTHER.—On principles of public policy, all communications between husband and wife which do not upon their face appear to be public, or intended to be so, are shielded from public scrutiny as evidence, and neither can testify as to such communications when the interests of the other are involved; and in criminal cases, the subsequent dissolution of the marriage relation, by decree of divorce, does not affect the principle nor remove the incompetency. *Id.*
9. SAME.—But the wife is a competent witness against her husband on a trial for adultery. *Lord v. The State*, 17.
10. NON-IDENTITY — EVIDENCE — INSTRUCTION.—Evidence of non-identity should be treated like any other evidence offered by defendant for the purpose of showing that he was not guilty, it being merely evidence in rebuttal. *The State v. McCracken*, 209. (*McLain v. The State*, 21, and note.)
11. ALIBI.—The burden of proof is on defendant to establish an *alibi* by a preponderance of the evidence. *Id.*
12. DECLARATIONS OF ACCUSED — RES GESTÆ.—Declarations made by the accused on his return to his home, as to where he had been, held inadmissible as part of the *res gestæ*. *Id.*
13. PROOF OF IDENTITY.—A witness who has testified that he thought the man he saw at a certain place was defendant may be asked on cross-examination if there was any doubt existing in his mind that the man seen by him was defendant. *People v. Wallin*, 212.
14. POINTING OUT ACCUSED.—Evidence that a party robbed pointed out defendant, and said to a witness that he was one of the men who robbed him, held of no importance, and its admission not error. *Id.*
15. FAILURE OF ACCUSED TO ASSIST IN ARRESTING GUILTY PARTY.—A defendant in whose saloon a robbery has occurred, and who is alleged to have been concerned therein, may be asked, when a witness in his own behalf, if he assisted the officer in arresting the guilty party. *Id.*
16. CO-DEFENDANT AS WITNESS — INSTRUCTION.—An instruction as to the credibility as a witness of a co-defendant who has pleaded guilty, that when the law permits persons to testify as witnesses it assumes that they may tell the truth, and whether they have done so or not is for the jury to say, under all the circumstances appearing before them, held proper. *Id.* (See note.)
17. NON-EXPERT — EVIDENCE.—One not a surgeon or expert is not competent to testify as to effect of gunshot wounds on a trial for murder by shooting. *State v. Justus*, 511.
18. EXPERIMENTS.—Experiments to be admissible as evidence must be shown to have been made under conditions the same as those existing in the case on trial. *Id.*
19. ENTICING AWAY GIRL FOR PURPOSE OF PROSTITUTION — EVIDENCE.—Evidence that a party accused of enticing away a girl under sixteen years of age for the purpose of prostitution, invited her to his photographic rooms at various times, showed her obscene pictures, paid her small sums of money, and on several occasions had illicit intercourse with her, up to the time when she was discovered by her mother and removed, will be sufficient to sustain a conviction. *People v. Cummons*, 221.
20. FALSUS IN UNO, FALSUS IN OMNIBUS — RULE CONFINED TO MATERIAL MATTER.—The principle that, if the jury believe from the evidence

that a witness has wilfully sworn falsely in the case, they are at liberty to disregard his testimony except so far as corroborated by other credible evidence in the case, is subject to the essential qualification that such knowingly false testimony must have been to matters material to the issue. *Dacey v. The People*, 461.

21. **ADVICE OF COUNSEL NOT ADMISSIBLE TO JUSTIFY CRIME.**— On the trial of one charged with murder, testimony that the defendant had consulted counsel, and had by counsel been advised that he had a legal right to maintain possession of the land, in a dispute about which the alleged murder took place, is not admissible in evidence. *Weston v. The Com.*, 436. (See note.)
22. **FLIGHT, CONCEALMENT, ETC.**— Any conduct on the part of the defendant indicating a consciousness of guilt, such as flight, concealment, etc., being competent evidence against him as an implied admission, is competent evidence. *Clarke v. The State*, 525.
23. **IMPEACHING WITNESS.**— The credibility of a witness cannot be impeached by proof of the declarations of third persons, not made in his presence. *Id.*
24. **DIFFICULTY BETWEEN DEFENDANT AND THIRD PERSON OR DECEASED.**— The prosecution having proved the fact of a difficulty between the defendant and a third person, for whom the deceased was supposed to have been mistaken at the time of the homicide, the defendant cannot be allowed to prove the cause, merits or details of that difficulty. *Id.*
25. **TESTIMONY OF DEFENDANT AS WITNESS—CROSS-EXAMINATION.**— When the defendant in a criminal case avails himself of the statutory privilege of testifying as a witness (Sess. Acts 1884-5, p. 139), he subjects himself to the test of cross-examination as to any matter connected with the transaction, or pertinent to the issue, and impeachment by evidence assailing his general character, or by proof of contradictory statements on other occasions; but he cannot be cross-examined, against his objection, as to his connection with or commission of other offenses, or matters which would unduly prejudice him in the minds of the jury,—as by asking whether he did not "belong to the Jesse James gang." *Id.* See, also, *Spies v. The People*, 570, p. 687.
26. **THREATS BY DEFENDANT** against a third person, see **THREATS**, 1.
27. **SUBSEQUENT THREATS**, see **THREATS**, 2.
28. **ACTS AND DECLARATIONS** of conspirators, newspaper articles, etc., see **ANARCHIST CONSPIRACY MURDER CASE**, *Spies et al. v. The People*, 570.
29. **LIKENESS OF CHILD** to defendant in bastardy case, see *Hanawalt v. The State*, 65.
30. Evidence of appellant's extravagant habits, or of expenditures beyond his salary, is incompetent. *Snapp v. The Com.*, 183.
31. **MARRIAGE**, how it may be proved. *Lord v. The State*, 17.
32. **OTHER OFFENSES**, when not admissible in evidence. *Snapp v. The Com.*, 183. (See *Swan v. Com.*, 4 Am. Cr. R., 188 and note.)
33. **DECLARATIONS OF ACCUSED**, *res gestæ*, see *The State v. McCracken*, 209.
34. **ABDUCTION**, evidence necessary in corroboration, etc., see *People v. Plath*, 1.
35. **EVIDENCE OF THREATS**, see **MURDER**, 8. **THREATS**, 1, 2.
36. **EVIDENCE OF CHARACTER**, see **MURDER**, 9.
37. **EVIDENCE OF CHARACTER OF DECEASED**, see **MURDER**, 10.

EXTRADITION.

1. MURDER — FUGITIVES FROM JUSTICE — INTERNATIONAL LAW.— Apart from the provisions of the treaties on the subject, there exists no well-defined obligation on one independent nation to deliver to another fugitives from its justice; and though such delivery has often been made, it was upon the principle of comity. *United States v. Rauscher*, 222.
2. THE NATIONAL AND NOT THE STATE GOVERNMENT TO NEGOTIATE FOR SURRENDER OF FUGITIVES.— In any question of this kind which can arise between this country and a foreign nation, the extradition must be negotiated through the federal government, and not by that of a state, though the demand may be for a crime committed against the law of that state. *Id.*
3. FUGITIVE cannot be tried for an offense other than that specified in the demand for his surrender. *Id.*

FALSE PRETENSES.

1. INTENT.— Fraudulent intent not necessarily shown by false representations made by a purchaser of personal property, but such intent is shown by such representations designedly made to induce the sale and delivery of the property. *The State v. Neimeyer*, 249.
2. VARIANCE OF PROOF.— Where it is charged that the defendant said that he was conducting a butcher shop, evidence that he said he must have some cattle to butcher that night sufficiently sustains the charge. *Id.*
3. SWINDLING AND THEFT — INDICTMENT.— The fact that an indictment for swindling contains allegations of acts on the part of accused that constitute theft does not make the indictment bad for swindling. *Sims v. The State*, 252.
4. FORMER ACQUITTAL.— A plea of former acquittal to an indictment for obtaining property under false pretenses by trading cattle to which the accused had no title, for a horse, is not borne out by the fact that the defendant had been tried for stealing the cattle, and acquitted. *Id.*
5. FIRM NAME.— In an indictment for obtaining goods from a firm by false pretenses the names of the individual members need not be set out. To charge that the false pretenses were made to the partnership by its firm name is sufficient. *The State v. Williams*, 256. (See note.)
6. ALLEGATIONS.— It is sufficient, as showing that the firm believed the representation to be true, to charge that they "relied on such false representations." *Id.*
7. UNCERTAINTY IN INDICTMENT.— An indictment in such case not alleging the manner in which the goods were parted with and obtained, so as to show the connection of the false pretenses therewith, is bad for uncertainty. *Id.* (See note.)
8. VENUE OF OFFENSE WHERE MONEY RECEIVED.— The crime of obtaining money or property under false pretenses is consummated where the money or property is received, without regard to where the pretenses are made. *The State v. Shaeffer*, 259.
9. SAME — JURISDICTION — BILLS OF EXCHANGE.— In a prosecution for obtaining money under false pretenses in the Missouri criminal court against a drawer of a draft in Missouri on the bank-account of a drawee in New York, the money being collected through the agency of two other banks of New York and Missouri, respectively, it was held that the crime was not committed in Missouri, and hence the court had no jurisdiction. *Id.*

FORGERY.

1. In an indictment for forgery the intent to defraud the person whose name is forged may be alleged, and if the criminal act is proved, such intent will be conclusively presumed, although the respondent in fact intended to defraud another. *Rounds v. The State*, 256.
2. ALLEGATION.—An allegation of the name of the person to whom the forged instrument was uttered, not necessary in an indictment for forgery. *The State v. Hart*, 269.
3. FORGERY OF TITLE DEED.—It is not necessary to set out, in an information charging the forgery of a deed, the title of the person intended to be defrauded, nor in what the forgery consisted. *The People v. Van Alstine*, 272.
4. DUPLICITY — FORGERY AND UTTERING FORGED INSTRUMENT.—A count in an information that charges the forgery of a deed, and also the uttering of the forged deed, is bad for duplicity. *Id.* (See note.)

FORMER ACQUITTAL.

See JEOPARDY.

GAMBLING.

1. QUI TAM ACTION — PLEADING.—It is not necessary that an indictment for the recovery of a penalty shall disclose the name of the prosecutor, even though he is to share such penalty. *State v. Willis*, 284.
2. LOTTERY — INDICTMENT — GAMBLING.—A count in an indictment which alleges that the respondent was engaged in "a lottery, scheme or device of chance" is not bad for duplicity, nor is it bad for the same reason if it alleges that the respondent "was concerned in a lottery by printing and circulating an advertisement of it, and also in other ways." *Id.* (See note.)
3. ADVERTISING LOTTERY.—A count alleging that the respondent caused a lottery advertisement to be inserted in a paper published out of the state, and circulated within the state, is bad unless it also alleges that the respondent had something to do with such circulation. *Id.*
4. SELLING LOTTERY TICKET.—An indictment for being unlawfully concerned in a lottery "by selling to one H. M. one ticket" is good in that respect, the words "then and there" selling being immaterial in the class of inferior cases to which that offense belongs. *Id.*
5. SAME — SETTING OUT TICKET IN INDICTMENT.—A lottery ticket may be set out in an indictment by copy, and if it does not appear on its face to be a ticket, it may be alleged and proved as such. *Id.*

GRAND JURY.

1. INFORMATIONS.—The act "to provide for prosecuting offenses on information, and to dispense with the calling of grand juries except by order of the district judges," which took effect June 10, 1885, of the state of Nebraska, applies to all cases where grand juries were required after the act took effect. *Jones v. The State*, 45.
2. GRAND JURY — HOW REQUIRED.—The proceeding by information is exclusive, unless the judge in a written order, filed with the clerk of the court, shall require a grand jury, in which case it shall be drawn in the manner provided by law. *Id.*
3. TALESMEN.—The authority to require a jury to be summoned from the by-standers is repealed by implication. *Id.*

4. **GRAND JURY — INDICTMENT — TERM OF COURT.**— A grand jury legally drawn and summoned for the year of 1884, on January 7, 1885, found an indictment against defendant; the term of court at which the indictment was found commencing on December 8, 1884, and, so far as the record showed, not having terminated. *Held*, on motion in arrest of judgment, that the indictment was valid. *The State v. Winebrenner*, 288. (See note.)
 5. **DISCHARGE OF GRAND JURY ILLEGALLY DRAWN — NEW JURY — MOTION TO QUASH.**— Where a grand jury has been challenged because not regularly drawn, and such challenge sustained, and a second grand jury impaneled, a party indicted by the second jury cannot move to quash the indictment because the first jury was improperly discharged, and hence the second jury unlawfully impaneled. *State v. Hart*, 269.
- OBJECTION TO ORGANIZATION OF.** *State v. Price*, 33.
- IRREGULARITY IN SELECTION OF.** *The State v. Skinner*, 307.
- UNAUTHORIZED PERSON BEFORE,** see **INDICTMENT**, 12.
- SIGNATURE OF FOREMAN.** *State v. Bowman*, 296.

HABEAS CORPUS.

See **CONSTITUTIONAL LAW**, 5, 8.

HABITUAL CRIMINAL'S ACT.

1. **HABITUAL CRIMINAL'S ACT CONSTITUTIONAL.**— The act of 1883, providing increased penalties for second and subsequent offenses of burglary, grand larceny, horse-stealing, robbery, forgery or counterfeiting, is not unconstitutional, either as visiting penalties disproportioned to the offenses under constitution of 1870 of Illinois (art. 2, § 11), or as placing the defendant in jeopardy a second time for the same offense. *Kelley v. The People*, 135.
2. **FOR WHAT OFFENSES THE SUBSEQUENT CONVICTIONS MUST BE HAD.**— Section 1 of the act above cited does not require that the second offense dealt with therein shall be a second conviction of the identical crime for which the offender was first convicted; but provides that, whenever any person having been convicted of either of several enumerated crimes shall thereafter be convicted of *any one of such crimes* he shall be liable to such increased penalty. Therefore, a conviction of burglary, accompanied by proof of a former conviction of robbery, constitutes a case of second offense. *Id.*
3. **ERROR IN FORMER CONVICTION IMMATERIAL.**— The fact that the former conviction, which is proved in order to constitute a second offense, was erroneous, will not prevent the operation of the statute, if such error did not deprive the court of jurisdiction. *Id.*

See **CONSTITUTIONAL LAW**, 6.

HOUSE OF ILL FAME.

Howell's Statutes of Michigan, section 9286, prescribing the punishment of a person keeping a house of ill fame, is not repealed by act 136 of the public acts of 1883, relating to disorderly persons. *People v. Gustin*, 290. (See note.)

INDICTMENT.

1. **MURDER — INDICTMENT — REQUISITES — ABORTION — MALICE.**— In an indictment for murder the killing must be charged as done with malice aforethought. *State v. Thurman*, 16.

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2. **AIDING ESCAPE OF PARTY UNDER ARREST.**—An information for aiding a party under arrest to escape need not allege that the respondent had knowledge of the arrest, or that the party was in custody, or that respondent did the act charged with an intent to aid the escape. *People v. Murray*, 31.
3. **Charging the offense laid in the information substantially in the language of the statute, accompanying it with a statement of the facts upon which it arose, is sufficient.** *Id.* (But see *Burney v. The State*, 49.)
4. **IN AN INDICTMENT FOR ARSON** it is not necessary to charge the house was set on fire with malice aforethought, but merely "wilfully and maliciously," nor does it vitiate the indictment that the copulative is used when the statute has wilfully or maliciously. *State v. Price*, 33.
5. **INDICTMENT — CONCLUSION — AMENDMENT.**—When an indictment contains two counts charging the same crime, one ending with and the other without the words "contrary to the form, force and effect of the statute in such case made and provided, and against the peace and dignity of the state," the defective count may be amended by adding those words, as such conclusion is matter of form and not of substance, although the constitution requires all indictments to conclude with the words "against the peace and dignity of the state." *State v. Amadon*, 41. (But see *Ex parte Bain*, 122.)
6. **MURDER — ASSAULT OF OFFICER.**—An indictment under the Code (Oregon), § 677, for assaulting an officer with a deadly weapon must set out that the accused knew that the person assaulted was an officer. *State v. Smith*, 43.
7. **INDICTMENT AND INDORSEMENTS PART OF THE RECORD.**—The original indictment and its indorsements constitute a necessary part of the record, and whatever is properly shown by them is considered as shown by the record. *Padgett v. The State*, 51.
8. **MOTION TO QUASH INDICTMENT.**—A motion to quash will be sustained where the indictment is not indorsed by the foreman of the grand jury. *The State v. Bowman*, 296.
9. **SIGNATURE OF FOREMAN.**—Where the indictment is signed by one whom the record shows to have been the foreman, the mere omission to add the word "foreman" will not invalidate the indictment. *Id.*
10. **VENUE — INDICTMENT.**—An indictment alleging, generally, an offense to have been committed in the county where it is found, if otherwise valid, is sufficient without any more particular designation of the precise locality. *The State v. Sneed*, 298.
11. **GRAMMATICAL OR VERBAL INACCURACIES NOT FATAL TO INDICTMENT.**—Neither verbal nor grammatical inaccuracies nor the misspelling of words in an indictment are fatal to it, where they do not affect the sense, and where, from the whole context, the words as well as the meaning can be determined with certainty by a person of ordinary intelligence. *State v. Halida*, 407.
12. **UNAUTHORIZED PERSON BEFORE GRAND JURY IMPROPER.**—The presence of a person before the grand jury who is not authorized by law is highly improper, and must be taken advantage of by motion to quash before trial. After verdict the motion should be in arrest of judgment. *State v. Justus*, 511.
13. **NOT ALLEGING PLACE OF ACT.**—When all the sections of a penal statute, taken together, show that the act in question was intended to be forbidden only in a particular part of a river, the complaint must allege the act to have been committed in that part, and a complaint alleging the act to have been committed in the river generally is bad. *State v. Turnbull*, 108.

14. **INDICTMENT FOR CONCEALING STOLEN GOODS.**—An indictment for concealing stolen goods is sustainable, notwithstanding the fact that the articles charged therein to have been concealed are collectively instead of separately valued. *State v. Gerrish*, 307.
15. **BURGLARY.**—Not necessary to allege ownership of building in burglary, and if owned by corporation not necessary to allege that the company was incorporated. *The State v. Shields*, 98.
16. **OWNERSHIP OF BUILDING.**—May be laid in occupant. *Smith v. The People*, 80.
17. **VALUE OF GOODS TAKEN IN BURGLARY.**—Not necessary to allege. *State v. Kane*, 99.

ADULTERY, indictment for, see **ADULTERY**, 1.

SIGNATURE OF FOREMAN OF GRAND JURY, see *State v. Bowman*, 286.

FIRM NAME, see *The State v. Williams*, 256.

DUPLICITY, see *The People v. Van Alstine*, 272 and note.

STOLEN PROPERTY, description of, see *Riggs v. The State*, 394.

See **GAMBLING**.

INSANITY.

As a defense in trial for murder, see **INSTRUCTIONS**, 2.

INSANITY OF JUROR, see **NEW TRIAL**, 4.

INSTRUCTIONS.

1. **CO-DEFENDANT AS WITNESS — INSTRUCTION.**—An instruction as to the credibility as a witness of a co-defendant who has pleaded guilty, that when the law permits persons to testify as witnesses it assumes that they may tell the truth, and whether they have done so or not is for the jury to say, under all the circumstances appearing before them, held proper. *People v. Wallin*, 212.
2. **INSANITY AS A DEFENSE — DEFINITION — PRESUMPTION OF SANITY — REASONABLE DOUBT.**—The law presumes every man to be sane until insanity is made to appear. To make a case of insanity it must "appear" that, at the time of committing the acts charged, the accused was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, by overriding his reason and judgment. The legal presumption of insanity may be overcome by evidence tending to prove insanity, sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. *Dacey v. The People*, 461. (See note.)
3. **SINGLE INSTRUCTION NEED NOT EMBODY WHOLE LAW OF CASE — DEGREE OF PROOF.**—It is impossible to embody in a single instruction all the law relative to the subject of a case; e. g., relative to the nature of the case to be made out, and the degree of proof necessary to sustain it. It will be sufficient if there is nothing in the particular instruction inconsistent with the principle pertaining thereto, and other instructions, in the series given, correctly announce the rule. *Id.* Also *Spies v. The People*, 570, p. 691 et seq.
4. **REASONABLE DOUBT.**—The portion of the charge relating to reasonable doubt to which complaint is made is that which is contained in the following words: "You are not at liberty to disbelieve, as jurors, if, from the evidence, you believe as men." This expression has been sanctioned by the supreme court of Pennsylvania as having been properly used in an instruction given to the jury by a trial judge, and this court is inclined to follow the ruling there laid down. *Spies v. The People*, 570.

5. INSTRUCTIONS.— The instructions in this case reviewed and found to be unobjectionable when taken and construed together. *Id.* See p. 691 *et seq.*
6. TRIAL.— INSTRUCTION.— FAILURE OF ACCUSED TO TESTIFY.— Where no request is made at the trial to instruct the jury that they are not to consider the failure of the accused to testify on his own behalf, to his prejudice, the failure to so instruct will not be considered error. *State v. Stevens*, 88.
7. ORAL STATEMENTS BY COURT.— TRIAL.— INSTRUCTIONS.— Where written instructions are asked and given, the making of prefatory oral statements by the court is not to be commended; but where it appears that no harm was done, there will be no reversal on that account. *Sample v. The State*, 416.
8. DEGREE OF CRIME.— MURDER TRIAL.— INSTRUCTION.— Upon the trial of an indictment for murder, evidence considered as sustaining a conviction for manslaughter in the second degree. An instruction of the court to the jury that the case did not justify a conviction for manslaughter in either the third or fourth degree was not erroneous. *State v. Caudeny*, 418.
9. INSTRUCTIONS.— NEWLY-DISCOVERED EVIDENCE.— Various points respecting the charge of the court, and relating to the claim of newly-discovered evidence, considered. *Id.*
10. CREDIBILITY OF WITNESSES FOR JURY. *Id.*
11. COURT NOT OBLIGED TO COMMENT ON FACTS. *Id.*
12. Refusal to give instructions already given in substance is not error. *People v. Robertson*, 519.

INTENT.

PROOF OF FELONIOUS INTENT. *Padgett v. The State*, 51.

DRUNKENNESS. *State v. Barbee*, 178.

FALSE PRETENSES. *The State v. Neimeyer*, 249.

See PRESUMPTIONS, 1. FALSE PRETENSES, 1. FORGERY, 1. INTOXICATING LIQUORS, 16. MANSLAUGHTER, 5.

INTOXICATING LIQUORS.

1. VIOLATION OF PROHIBITORY LAW.— JURISDICTION OF DISTRICT COURT.— The district court has original and concurrent jurisdiction with justices of the peace to hear and determine criminal prosecutions for violations of the prohibitory liquor law of 1881, of the state of Kansas, where the punishment to be imposed cannot exceed a fine of \$500, or imprisonment in the county jail one year. *State v. Brooks*, 299.
2. INFORMATION.— Prosecution in the district court may be upon information filed by the county attorney. *Id.*
3. ARREST.— TRIAL.— And where such information states an offense, and is sworn to positively by some person, it is sufficient of itself to authorize the clerk to issue a warrant for the arrest of the defendant, without any finding by the clerk or other person of probable cause to believe the defendant guilty of the offense, and is sufficient to authorize the district court to put the defendant upon his trial. *Id.*
4. VERIFICATION OF INFORMATION.— An information sworn to positively by some person need not be verified by the oath of the county attorney. *Id.* (See note.)

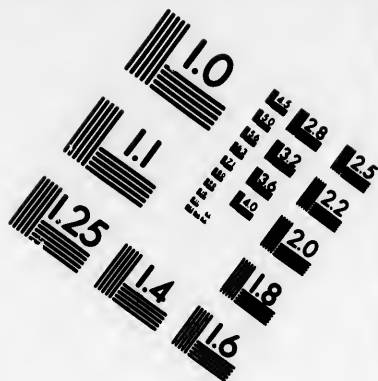
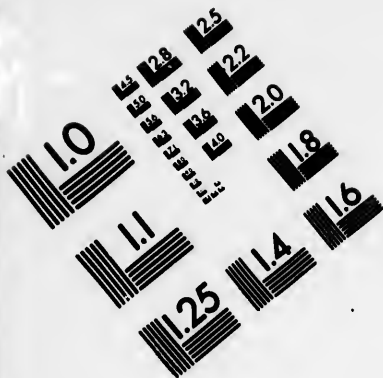
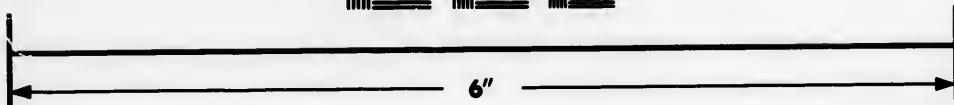
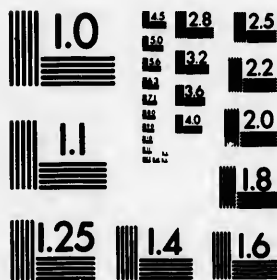


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5. **STATING TIME WHEN OFFENSE WAS COMMITTED.**—Where a county attorney files an information on October 15, 1884, and states that the offense was committed on the — day of —, 1884, and does not state the day or the month when the offense was committed, *held*, that the information is, nevertheless, sufficient. *Id.*
6. **KIND OF LIQUOR SOLD.**—Kind of intoxicating liquor, or person to whom sold, need not be stated. *Id.*
7. **CONVICTION — EVIDENCE.**—Where the information is verified by the oath of a private person, and not by the county attorney, the defendant should not be found guilty of any offense, except some offense which the complaining witness had in contemplation at the time of verifying the information. *Id.*
8. **SALE OF LIQUOR — EVIDENCE.**—In a case where the defendant is charged with unlawfully selling intoxicating liquors without a permit, in violation of the prohibitory liquor law of the state, and evidence is introduced making the question important, it is not error for the court to permit the witness to answer as to "who assumed to be the proprietor of and to control the premises described in the indictment." *The State v. Skinner*, 307.
9. **SALE BY CLERK.**—Where a person acts as clerk or agent of another in selling intoxicating liquors for him, with his knowledge and consent, in violation of law, the principal may be prosecuted and punished for such unlawful sales by his clerk or agent. *Id.*
10. **PRINCIPAL AND AGENT — GOODS SENT C. O. D.**—Where a merchant receives an order for goods, and ships the same C. O. D., the carrier becomes the agent of the seller for the purpose of delivering the goods and collecting the price, if accepted; otherwise to hold them subject to the seller's order. *State v. O'Neil*, 319. (See note.)
11. **SALE OF GOODS — INTENTION OF THE PARTIES.**—Whether or not, and when, the legal title passes on the sale of goods or merchandise from the vendor to the vendee, depends upon the intention of the parties, and is to be gathered from their acts, and all the facts and circumstances in the case. *Id.*
12. **CONDITION PRECEDENT.**—Where there is a condition precedent attached to the contract, the title in the property does not pass to the vendee until there has been a performance or a waiver of the condition; and where goods are sent C. O. D. the title does not pass until they are accepted and paid for. *Id.*
13. **INTOXICATING LIQUORS — KEPT FOR UNLAWFUL PURPOSES — CONFISCATION.**—Section 2 of No. 43 of the acts of 1882 (Vermont), providing for the confiscation of intoxicating liquors kept and intended for unlawful use, is within the police powers delegated to the legislature by article 5, part 1, of the constitution, and is valid. *Id.*
14. **An indictment charging a person with keeping and maintaining "a building occupied by himself as a saloon and shop, and resorted to for the illegal sale of intoxicating liquors," is not sufficient to bring the offense within the statute against nuisances.** *R. S. Me., ch. 17, § 1. State v. Dodge*, 329. (See note.)
15. **LICENSE.**—A license issued to one man to sell intoxicating liquor at a certain place affords no protection to another who has purchased such place, and sold intoxicating liquor thereat. *Heath v. State*, 331.
16. **NUISANCE — INTENT — SALE BY CLERK.**—Under the code of Iowa (secs. 1525, 1540, 1542, 1543), a person is not guilty of nuisance on account of the unlawful sale of liquor in his store by his clerk, unless he occupies the place or carries on the business for the purpose of making such sales. An unlawful intent on his part is an essential ingredient of the crime. *State v. Hayes*, 335. (See note.)

JEOPARDY.

1. **JEOPARDY.**—Where, in a trial for a capital offense, the jury, after being impaneled and sworn, is, with the consent of the prisoner, allowed to separate, and afterwards discharged by the court on the ground that such separation was illegal, *held*, that the jury was not discharged under such extreme necessity as to subject the prisoner to be again put in jeopardy of his life for the same offense. *Hilands v. Com.*, 339. (See note.)
2. **PLEA—FORMER JEOPARDY.**—A plea of former jeopardy is allowable, after the jury is charged with the prisoner, and it is so charged when the twelve jurors are duly impaneled and sworn. *Id.*

See FALSE PRETENSES, 4.

JURISDICTION.

1. **HOW QUESTION MAY BE RAISED.**—Questions of jurisdiction may be raised by demurrer; by motion for instructions; by motion in arrest of judgment, on general issue; and by writ of error. *Ryan v. The Com.*, 346.
2. **CONSTRUCTION OF STATUTES.**—Unless a statute by its language expressly or by necessary implication demands such construction, it will not be construed as repealing a previous statute, or as being retrospective. *Id.*
3. **CASE AT BAR.**—Prior to act of January 31, 1884, incorporating the city of Roanoke, and to act of February 25, 1884, creating the hustings court of that city, the county court of Roanoke county had jurisdiction of all offenses committed within that county, which embraced what afterwards became the limits of that city. In May, 1884, in that hustings court, M. R. was indicted for the murder of her husband, who died January 27, 1884, within those limits. *Held*, the hustings court had no jurisdiction over the offense. *Id.*

See FALSE PRETENSES, 9. INTOXICATING LIQUORS, 1.

JURORS.

1. **NEW TRIAL—JUROR NOT QUALIFIED—AFFIDAVITS.**—Affidavits, on motion for new trial on ground that one of the jurors was not a qualified elector, *held* insufficient to establish such disqualification, and new trial refused. *The People v. Scott*, 349.
2. **KNOWLEDGE OF DISQUALIFICATION.**—When a new trial is asked on the ground of the disqualification of a juror, it must appear affirmatively that the party convicted had no knowledge of the alleged disqualification until after the jury had been impaneled, when it was too late to take the objection by challenge. *Id.* (See note.)
3. **QUALIFICATION OF JURORS—ELECTORS.**—If his intention to become a citizen is declared in due form of law by a man of foreign birth, and the other conditions of age, and residence within the state and voting precinct for the proper length of time, are found to exist, article 7, section 1, of the Michigan constitution, confers on him the right of suffrage, and he is qualified to act as a juror, as prescribed in Howell's Statutes, section 7555. *Id.*
4. **JUROR NOT DISQUALIFIED BECAUSE HE READS NEWSPAPERS.**—A juror is not disqualified because he has read the newspaper accounts of the trial of one jointly indicted with the defendant, and the newspaper report of the testimony taken at the said trial, if he has not formed a fixed opinion as to the guilt of the defendant himself. *Weston v. The Com.*, 436. Also the Anarchist Conspiracy Murder Case, *Spies v. The People*, 570, at p. 705 *et seq.*, and *Bohannon v. State*, 487.

5. JURORS ACCEPTED BY DEFENDANTS AFTER EXHAUSTING ALL PEREMPTORY CHALLENGES.—In this case it is held that it must be made to appear that an objectionable juror was put upon the defendants after they had exhausted their peremptory challenges; that unless objection is shown to one or more of the jury who tried the case, the antecedent rulings of the court upon the competency or incompetency of jurors who have been challenged and set aside will not be inquired into on error. *Spies v. The People*, 570, p. 705 *et seq.*
6. JURYMEN NOT PERMITTED TO IMPEACH THEIR OWN VERDICT. *State v. Price*, 33.
7. NUMBER OF PEREMPTORY challenges allowable when indictment or information contains several charges of a kindred character. *The State v. Skinner*, 307.

JURY.

1. JURY — CHALLENGE TO THE ARRAY.—A challenge to the array, on the ground that the names of additional jurors were not properly drawn, will not be sustained if the jurors were drawn "in open court," and "from the box directed by the court," even though no directions were given by the court, except by the formal order entered, where that specified the box as the one "containing the names of the trial jurors for said court." The fact that the other two boxes were not in court is a mere formal irregularity. *People v. Kiernan*, 534.
2. PROVINCE OF JURY — WEIGHT OF EVIDENCE.—It is the duty of the court to declare the law to the jury in criminal as well as in civil cases. Whether the evidence has a tendency to prove any fact in issue in a criminal cause is for the determination of the court; not so as to the weight of evidence. *State v. Rheams*, 538.

POLLING THE JURY, see PRACTICE, 12.

KIDNAPPING.

CHILD-STEALING — UNLAWFUL DETENTION — INTENT.—It is an essential element of the crime of child-stealing, under section 6825 of the Revised Statutes of Ohio, that the intent unlawfully to detain or conceal must accompany the act of taking the child. *Mago v. State*, 352. (See note.)

LARCENY.

1. LARCENY AT COMMON LAW — LARCENY AS BAILEE — TAKING INVITO DOMINO — DELIVERY OF CHATTEL UNDER MISTAKE AS TO ITS CHARACTER — MISTAKE COMMON TO BOTH PARTIES — SUBSEQUENT FRAUDULENT APPROPRIATION.—The prisoner asked the prosecutor for the loan of a shilling. The prosecutor gave the prisoner a sovereign, believing it to be a shilling, and the prisoner took the coin under the same belief. Some time afterwards he discovered that the coin was a sovereign, and then and there fraudulently appropriated it to his own use. The prisoner was convicted of larceny of the sovereign. *Held*, that the prisoner had not been guilty of larceny as a bailee; but the court being equally divided as to whether the prisoner had been guilty of larceny at common law, the conviction stood. *The Queen v. Ashwell*, 355.
2. But the old rule that the innocent receipt of a chattel, coupled with its subsequent fraudulent appropriation, does not amount to larceny, is not affected by the decision in *Reg. v. Ashwell*. That case distinguished and discussed. *The Queen v. Flowers*, 353.
3. LEGERDEMAIN WITH CARDS.—S. introduced himself to B. as a traveler for a tea-dealing firm in Cincinnati, and told him that one of the means used for getting custom in a new place was offering purchasers 2

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chance, by drawing cards, to get fifty pounds free, in addition to the purchase, if they drew the winning card. In order to carry out the scheme, he wanted B. to accompany him, and showed him how to draw the lucky card, by a little dot on the back. While they were practicing, and B. succeeded each time in drawing the card, J., a confederate of S., came up, appearing to be a stranger, and inquired what they were doing, and S. told him he would show him, and gave him the same explanation as to the mode of selling tea, but did not tell him about the marked cards. S., after some talk, said that B. could draw the fifty-pound card. J. offered to bet \$100 that he could not, and held out to S. what seemed to be a roll of bills. S. said he had not the money, but had a \$300 check. J. said he did not want the check; he wanted money. S. asked B. if he had it. B. said he had not \$100, but had \$80. B., at S.'s request, handed him the \$80, and S. whispered to him to draw the marked card. He drew it, and it was a blank, and S. at once handed the money to J. *Held*, larceny. *People v. Shaw*, 403.

4. A conviction for theft cannot be sustained unless the *animus furandi* is shown to have existed at the time of the taking. *Roberts v. The State*, 392.
5. The possession, shortly after the theft, of the property stolen is a fact to be submitted to the jury, but it does not raise, as to the party so possessing, the presumption of guilt. *State v. Hale*, 402. (See note.)
6. VERDICT—DEGREE OF CRIME.—As there is only one degree of grand larceny, a verdict finding a person, who is charged with the crime of "grand larceny," "guilty as charged," will be sufficient under the statute, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." *People v. Price*, 399.
7. GUILTY KNOWLEDGE—FALSE TOKEN, ETC.—Upon an indictment for simple larceny the state may convict by proving either that the subject of the larceny was received with a knowledge that it was stolen, or that it was obtained by a false token or false pretense. *State v. Halida*, 407.
8. Parties jointly implicated in a larceny may be indicted or informed against separately. *People v. Lange*, 413.
9. EVIDENCE.—It is not essential to a conviction of the offense of larceny that the bank-notes stolen should be particularly identified or described. *Riggs v. The State*, 394.
10. VALUE—SEPARATE PROOFS OF.—It is not necessary that separate proof of the value of the goods stolen be adduced at the trial under such indictment, but such value may be inferred by the jury from inspection of the goods, or from the description by witnesses. *State v. Gerrish*, 397.
11. SAME—ALLEGATION OF.—In burglary the value of the goods taken need not be alleged. *State v. Kane*, 99.

LIMITATIONS.

1. BURGLARY—STATUTE OF LIMITATIONS—TIME OF FORMER PROCEEDINGS NOT COUNTED.—By section 315 (R. S. 1874, ch. 33) of the Criminal Code of Illinois, indictments for burglary are barred after three years; but by section 318 of the same chapter the time during which any former proceedings were pending for the same offense, and which have been quashed, reversed on error, or set aside, is not counted in determining such three years. It is held that the words "set aside" are broad enough to include an indictment terminated by the entry of a *nolle prosequi*. *Swalley et al. v. The People*, 414.

2. **IDENTITY OF THE OFFENSE.**—The identity of the offense for which the former proceedings were pending may be shown by other evidence than by a comparison of the indictments themselves. *Id.*

MALICE.

See ABORTION, 5. INDICTMENT, 4. MURDER, 12.

MALICIOUS TRESPASS.

1. **INDICTMENT.**—An indictment charging that the defendant did "unlawfully and maliciously injure a certain cow, the property of B., then and there being, and there unlawfully and maliciously running, striking and beating said cow with a whip, stick," etc., while somewhat confused, is not so uncertain that the supreme court will reverse the judgment for failure of the lower court to sustain a motion to quash the indictment. *Sample v. The State*, 416.
2. **WHEN VALUE OF PROPERTY NEED NOT BE STATED.**—When it is averred that the property, or the owner thereof, has been damaged in a certain amount, the value of the property injured need not be stated. *Id.*

MANSLAUGHTER.

1. **JUSTIFIABLE HOMICIDE — RESISTING ARREST.**—In resisting an attempted arrest by a peace officer, even though the arrest be unlawful, the killing of the officer by shooting him is not justifiable, when there is neither danger of great bodily harm or other felony being committed by the officer, nor a reasonable apprehension of such danger in the mind of the person whose arrest is attempted. *State v. Cuntieny*, 418.
2. **MURDER TRIAL — INSTRUCTION — DEGREE OF CRIME.**—Upon the trial of an indictment for murder, evidence considered as sustaining a conviction for manslaughter in the second degree. An instruction of the court to the jury that the case did not justify a conviction for manslaughter in either the third or fourth degree was not erroneous. *Id.*
3. **VIOLATION OF CITY ORDINANCE — PUBLIC OFFENSE — ARREST.**—The violation of a city ordinance, punishable by fine or imprisonment, is a "public offense" authorizing the arrest of the offender without a warrant, by a peace officer (policeman) in whose presence the offense is committed. *Id.* (See note.)
4. **DISTINCTION BETWEEN MURDER AND MANSLAUGHTER.**—Death resulting from an assault made without the use of a deadly weapon, instrument, means, or force likely to produce great bodily injury (being itself an unlawful act, not amounting to a felony), is manslaughter, and not murder. *People v. Munn*, 431.
5. **THE INTENT.**—A person must be presumed to do that which he voluntarily and wilfully does in fact do, and that he intends all the natural, probable and usual consequences of his own act, but not all the possible consequences of his act. *Id.* (See note.)
6. **ACCIDENTAL HOMICIDE — MANSLAUGHTER.**—Where one accidentally killing another is culpably negligent he is guilty of manslaughter. *State v. Justus*, 511. (See note.)

MUNICIPAL CORPORATION.

See ORDINANCE.

MURDER.

1. **MURDER — UNLAWFUL COMBINATION.**—On the trial of one who is indicted with others for murder, but who is not alleged to have actually struck the blow causing death, it is not error to charge that the defendant was guilty if he were present at the scene of the killing, aiding and abetting in the purpose for which he and those with him were there, and the killing was in pursuance of or an incidental probable consequence of such purpose. An intent to hold possession of disputed land by a show of arms is unlawful, and draws to it the consequences of all acts done in carrying it into execution. *Weston v. The Com.*, 436.
2. **THE ANARCHIST CONSPIRACY MURDER CASE.**—The law with reference to conspirators and their responsibility for the acts of their co-conspirators, and the law relating to riotous assemblages and the responsibility of those who participate in such unlawful assemblies, and the law applicable to accessories and principals, ably stated and fully discussed in *Spies et al. v. The People*, 570.
3. **INSANITY AS A DEFENSE — DEFINITION — PRESUMPTION OF SANITY — REASONABLE DOUBT.**—The law presumes every man to be sane until insanity is made to appear. To make a case of insanity it must "appear" that, at the time of committing the acts charged, the accused was affected with insanity to such a degree as to create an uncontrollable impulse to do the act charged, by overriding his reason and judgment. The legal presumption of sanity may be overcome by evidence tending to prove insanity, sufficient to raise a reasonable doubt of his sanity at the time of the commission of the act for which he is sought to be held accountable. *Dacey v. The People*, 461. (See note.)
4. **SINGLE INSTRUCTION NEED NOT EMBODY WHOLE LAW OF CASE — DEGREE OF PROOF.**—It is impossible to embody in a single instruction all the law relative to the subject of a case; *e. g.*, relative to the nature of the case to be made out, and the degree of proof necessary to sustain it. It will be sufficient if there is nothing in the particular instruction inconsistent with the principle pertaining thereto, and other instructions in the series given correctly announce the rule. *Id.*
5. **FORM OF VERDICT FOR LESSER OFFENSE — DEFENDANT MUST ASK FOR AN INSTRUCTION AS TO, IF HE DESIRE IT.** *Id.*
6. **MURDER — MANSLAUGHTER — EVIDENCE REVIEWED TO SHOW ELEMENTS OF MANSLAUGHTER WANTING.** *Id.*
7. **MURDER — EFFECT OF VERDICT OF GUILTY OF LOWER DEGREE ON SECOND TRIAL.**—Where, on a trial for murder, the defendant is found guilty of a lower degree of homicide than the highest degree charged in the indictment, and on his motion a new trial is granted, the effect of granting a new trial is to set aside the whole verdict and leave the case for retrial upon the same issues as upon the first trial. *Bohanan v. State*, 487. (See note.)
8. **EVIDENCE OF THREATS.**—While threats against the deceased are admissible in evidence, in a trial for murder, to show malice, threats against another person are only admitted under circumstances which show some connection with the injury inflicted on the deceased. *People v. Bezy*, 503.
9. **EVIDENCE OF CHARACTER — ADMISSIBILITY OF.**—On trial for murder, evidence is admissible as to general character of defendant for peace and quietness, but evidence of particular facts is not admissible on such issue. *Id.*
10. **EVIDENCE OF CHARACTER OF DECEASED.**—On trial for murder it is error to permit the prosecution to give evidence as to the character of the deceased for peace and quietness. *Id.*

11. **MUTUAL COMBAT NO JUSTIFICATION OR EXCUSE.**—A homicide will not be justified nor excused, nor even mitigated, by the mere fact, of itself, that the deceased and the defendant were in actual combat at the time of the homicide. Justification or excuse for taking human life must arise out of the circumstances in which the killing took place. *People v. Robertson*, 519.
12. **MALICE.**—If the facts following the assault show that from the outset of the combat following the assault the words and acts of defendant show an intention to kill his assailant under color of the assault, it is murder; and the sufficiency of the facts to prove the existence of malice is a matter for the jury. *Id.*
13. **SELF-DEFENSE — DECLINING FURTHER COMBAT.**—A killing is not in self-defense if the defendant, having the opportunity to decline further combat in good faith, instead, continues the struggle or renews the affray, the result of which is the homicide. *Id.* (See note.)
14. **SELF-DEFENSE.**—Homicide is not justifiable as an act of self-defense from an assault threatening bodily harm, if it is apparent to the person assailed that the threatened injury may otherwise be avoided, as by retreating. *State v. Rheams*, 538. (See note.)
15. **KILLING ONE PERSON BY MISTAKE FOR ANOTHER.**—When one person is killed by mistake for another, the character of the offense is the same that it would have been if the fatal shot or blow had killed the person for whom it was intended. *Clarke v. The State*, 525.
16. **PREMEDITATION — EVIDENCE.**—Where the prisoner the night before fired one barrel of his revolver in his saloon, leaving three barrels loaded, and just before committing the crime said: "You or me going to die," it is sufficient to justify the jury in finding that the murder was deliberate and premeditated; and whether the previous firing was intended to empty the revolver or to test it is a question of fact for the jury. *People v. Kiernan*, 534. (See note.)
17. **PLEA OF GUILTY — WITHDRAWAL AFTER JUDGMENT.**—Where a defendant accused of murder withdraws his plea of not guilty voluntarily, and pleads guilty, and thereupon the degree of the crime is fixed by the court as murder in the first degree, and he is sentenced to be hung, it is too late for him then, though before the judgment is entered by the clerk in the record, to withdraw his plea of guilty, and to plead not guilty. *People v. Lennox*, 542.
18. **WAIVER OF TRIAL BY JURY BY PLEA OF GUILTY.**—By a plea of guilty on a trial for murder the defendant waives his right of trial by jury. *Id.*

NEW TRIAL.

1. **ABILITY TO PROVE FALSE SWEARING NOT GROUND FOR NEW TRIAL UNLESS DILIGENCE SHOWN.**—A new trial is not grantable for alleged ability to prove false swearing of a witness, when no attempt was made to obtain testimony to support such allegation and no diligence is shown. *State v. Price*, 33.
2. **JURYMEN ARE NOT PERMITTED TO IMPEACH THEIR OWN VERDICT.**—Public decency and public policy alike forbid that jurymen who have sworn to render a true verdict shall be permitted to swear that they rendered a false one. *Id.*
3. **NOISE DURING READING OF INSTRUCTIONS.**—An objection that instructions were so given, and the circumstances, by reason of noise, such that the jury did not hear the instructions, must be made at the trial, and the court should be requested to repeat the instructions in such manner and at such time that they could be heard by the jury; and if the case is allowed to go to the jury under such circumstances without objection, the verdict will not be set aside. *People v. Price*, 399.

4. **INSANITY OF JUROR.**—That a juror was insane is not ground for a new trial, when his want of capacity was known to the accused or his counsel when he was accepted. *Mackin v. The People*, 556.
- See **JURORS**, 1, 2.

NUISANCE.

1. **LESSEE AND OWNER OF PREMISES.**—Keeping a house or place for the purpose of selling intoxicating liquors is a nuisance under the Iowa code (section 1543, as amended by chapter 143 of the acts of the twentieth general assembly) and all engaged in keeping such house, as well as the owner thereof, may be enjoined from keeping and maintaining such nuisance. *Martin v. Bluthner*, 148.
2. **PROHIBITED ACT—LEASE.**—The fact that the prohibited act was lawful prior to the passage of the prohibitory statute does not exempt it; and the fact that the property in which the unlawful act was conducted was leased for that purpose prior to the passage of the prohibitory statute cannot relieve either the offender or the owner of the property from the operation of the statute. *Id.*

ORDINANCE.

1. **JUSTICE ENTITLING CASE IN NAME OF CITY.**—That a justice of a city, in the entries on his record, and in the papers subsequent to the warrant, entitles a criminal proceeding in the name of the city instead of in the name of the state, they fully disclosing the character of the proceeding, is a mere irregularity which will be disregarded. *City of Faribault v. Wilson*, 544.
2. **COMPLAINT FOR VIOLATING CITY ORDINANCE.**—A complaint for violation of a city ordinance need not set forth the ordinance, but may refer to the number and section and subject of the ordinance, and state the acts alleged to have been in violation of it. *Id.*
3. **POLICE POWER OF STATE—REGULATING KEEPING OF DOGS.**—To regulate the keeping of dogs, and enforce the regulations by forfeitures, fines and penalties, is within the police power of the state. *Id.*
4. **REASONABLE REGULATIONS.**—An ordinance of a city for that purpose construed, and held not to be unreasonable. *Id.*
5. **DOGS RUNNING AT LARGE—PUNISHMENT.**—The charter of the city empowered the council to punish the violation of any ordinance by fine and imprisonment. The power of the council to pass the ordinance construed, and it is held that giving the power to authorize the destruction of dogs does not take away the power to punish violations of the ordinance by fine or imprisonment. *Id.*
6. **PROOF OF PUBLICATION OF ORDINANCES.** *Id.*
7. **ORDINANCES—GENERAL LAWS—VILLAGE CHARTERS.**—Where a general law gives the selectmen of a town the power to permit or prohibit the use of billiard tables in a town, and a village charter, enacted subsequently, gave the village within such town the power to pass by-laws to suppress and restrain all description of gaming, held, that the word "restrain," when used as in this charter, conferred the power to license, and was not synonymous with "suppress;" and that the provisions in the charter derogate from, and are inconsistent with, the general law, and the legislature must have intended by the charter to have repealed the general law as to the territory embraced in the village limits. *In re Snell*, 548. (See note.)
8. **LEGISLATIVE POWER—SPECIAL PROSECUTOR—STATE'S ATTORNEYS.**—The legislature has the power to provide for the commencement of criminal prosecutions by other officers than state's attorneys, and to require

their election by the people, as in the case of town grand jurors, or appointment by the governor, as in the act in question. *Id.*

9. ORDINANCE, TITLE OF — MISDEMEANORS AND BREACHES OF THE PEACE.— A city ordinance entitled "An ordinance relative to misdemeanors, breaches of the peace and disorderly conduct," *held* not subject to the objection that it violated a requirement of the city charter that the subject of every ordinance should be expressed in its title, and that no ordinance should embrace more than one subject. *State v. Cantigny*, 418.
10. ORDINANCE IMPOSING COSTS OF PROSECUTION.— The charter only authorized the penalty of a fine and imprisonment. The ordinance added "costs of prosecution." This clause of the ordinance *held* void, but the remainder of the ordinance valid. *Id.*
11. PUNISHMENT LEFT TO DISCRETION OF COURT.— An ordinance is not invalid by reason of the amount of the fine or period of imprisonment being left to be determined in each case by the discretion of the court, within a prescribed limit. *Id.*
12. ORDINANCE CONSTRUED.— The "noise" which the ordinance prohibited construed to mean unreasonable noise, of a nature to disturb the community. *Id.*

FORM of ordinance, see *People v. Murray*, 31.

PERJURY.

1. INDICTMENT — AUTHORITY OF OFFICER TO ADMINISTER OATH — TAX RETURN.— In an indictment for perjury the jurisdiction and authority of the officer to administer the oath must be shown by proper averment. But this may be done either by an express averment that the officer had jurisdiction and authority, or by setting out such facts as make it judicially to appear that he had such authority and jurisdiction. Indictment *held* sufficient. *The State v. Cunningham*, 551. (See note.)
2. PROPERTY, WHEN ASSESSABLE.— An indictment charging a party with perjury in making a false return of his taxable personal property to an assessor of taxes that does not aver that the property which he is charged with having concealed from the assessor was assessable in the township of his residence, nor that it was assessable by the assessor of that township, is bad. *Id.*
3. WITNESS FALSELY ANSWERING QUESTIONS TENDING TO CRIMINATE HIMSELF.— It is the privilege of a witness to refuse to answer questions before a grand jury, if, in his opinion, the answers would tend to disclose matters that might criminate him; but if he waives such privilege and elects to testify, he must do so with as much truth and candor as if testifying concerning other matters as to which he is bound to answer; and if his testimony is willfully false, perjury may be assigned upon it. *Mackin v. The People*, 556.
4. RESULT OF INVESTIGATION IN WHICH FALSE TESTIMONY GIVEN.— The guilt of one falsely swearing, in an investigation by a grand jury as to alleged election frauds, does not depend upon the results of the investigation in which it occurred. *Id.*
5. ANSWER, IF GIVEN, MUST BE CORRECT.— Although a question put to a witness may assume that which is incorrect, he is bound, so far as he undertakes to answer it, to speak the truth. *Id.*
6. EVIDENCE TO CONVICT — REASONABLE DOUBT.— In a prosecution for perjury it is not error to instruct the jury to find defendant guilty, "if, from the evidence, they believe him guilty beyond a reasonable doubt." *Id.*

PLEADING.

1. PLEA IN ABATEMENT.—A plea in abatement is a dilatory plea, and must be pleaded with strict exactness; it must be certain to every intent. *The State v. Skinner*, 307.
2. SAME.—FORMER JEOPARDY, see JEOPARDY, 2.

PRACTICE.

1. CONTINUANCE.—WHAT AFFIDAVIT FOR, MUST SHOW.—It is necessary that a party applying for a continuance should show by affidavit how he would be injured by a denial of the motion, *e. g.*, by mentioning some witness who cannot be brought in now, but can be brought into court at a future term; or, if the continuance is asked on the ground that counsel have been employed only a short time previous, it should be stated that by reason of that fact counsel will be unable fairly to present the case. *Dacey v. The People*, 461.
2. SAME.—AS AFFIDAVITS FOR ARE GENERALLY TAKEN AS TRUE, THEY MUST BE CONSISTENT. *Id.*
3. CUMULATIVE EVIDENCE IS NOT GROUND FOR CONTINUANCE.—Evidence that is merely cumulative is not so necessary as to be ground for granting a continuance to enable a party to procure it, except in special circumstances, *e. g.*, a conflict of evidence on the point to prove which it is offered. *Id.*
4. WHAT AFFIDAVIT MUST STATE AS TO PROCURING ATTENDANCE OF NON-RESIDENT WITNESS. *Id.*
5. SERVICE OF COPY OF INDICTMENT AND SPECIAL VENIRE.—When the record shows an order for the service of a copy of the indictment and of the special venire on the defendant (Code of Alabama, § 4872), this court will presume compliance with the order, in the absence of objection in the court below founded on the want of it. *Clarke v. The State*, 525.
6. WAIVER OF TRIAL BY JURY BY PLEA OF GUILTY.—By plea of guilty on a trial for murder the defendant waives his right of trial by jury. *People v. Lemox*, 542.
7. ABUSE OF ARGUMENT BY COUNSEL.—Where the language used by the district attorney or assistant counsel, in opening a case or summing up to a jury, is deemed prejudicial to the accused, "the attention of the court should be called to it by proper objection, and a ruling had thereon. If the objection is overruled, and an exception taken, the question may be reviewed by the supreme court upon the language, objection, ruling and exception; but not otherwise." *McLain v. The State*, 21. (See *Hanawalt v. The State*, 65; *Bohannon v. The State*, 487.)
8. OPENING STATEMENT BY COUNSEL.—It is not error nor abuse of discretion in criminal trial for court to restrict counsel for defendant in the opening statement to stating what he expects to prove, without any argument upon such facts. *People v. Bezy*, 508.
9. MOTION IN ARREST.—That the record fails to show that the indictment was returned by the grand jury into open court is not a statutory cause for a motion in arrest of judgment. *Padgett v. The State*, 51. (*State v. Gerrish*, 397.)
10. INDICTMENT AND INDORSEMENTS PART OF THE RECORD.—The original indictment and its indorsements constitute a necessary part of the record, and whatever is properly shown by them is considered as shown by the record. *Id.*
11. ELECTION.—Where an indictment consists of two counts, each of which is sufficient as an indictment for simple larceny, the defendant cannot

require the state to elect and try him on one count only, unless it appears that the counts charge separate and distinct offenses. *State v. Hulida*, 407.

12. **POLLING JURY.**— In a case tried on such an indictment, after the jury had returned a general verdict of guilty, the court, upon being asked by the defendant to have the jury polled as to whether the verdict applied to both counts, stated to the jury: "I suppose you meant to find the prisoner guilty on both counts," and then directed the poll to be taken. *Held*: This was not error which could have prejudiced the defendant in this particular case, and is no ground for reversing the judgment. *Id.*
 13. **ADJOURNMENT.**— Pending the trial, the judge of a district court may adjourn the term, to be next held in another county, for one week, to give sufficient time to complete the trial, which, but for such adjournment, would proceed after the day fixed for the next term. *State v. Stevens*, 88.
 14. **RECORD.**— When trial occupies but one day, one mention in the record of the prisoner's presence is sufficient. *State v. Price*, 33.
- MOTION TO QUASH.** *State v. Bowman*, 206.
- TRIAL WITHOUT PLEA.** *The State v. Hayes*, 335.
- NOLLE PROSQU**, see **LIMITATIONS**, 1.
- WITHDRAWAL OF PLEA OF GUILTY**, see **MURDER**, 17.

PRESUMPTIONS.

1. **THE INTENT.**— A person must be presumed to do that which he voluntarily and wilfully does in fact do, and that he intends all the natural, probable and usual consequences of his own act, but not all the possible consequences of his act. *People v. Mann*, 431. (See note.)
 2. **APPEAL — INDICTMENT — PRESUMPTION.**— Where it is alleged that an indictment is invalid because found by a special grand jury when the regular grand jury was still in session, and the record is silent as to the matter, it will be presumed that the indictment was found in the manner the law directs. *Mackin v. The People*, 556. (See note.)
- PRESUMPTIONS** in respect to the possession of property recently stolen, see *McLain v. The State*, 21; *State v. Hale*, 402.
- PRESUMPTIONS** in respect to, in burglary, in larceny, and in receiving stolen goods, see *Smith v. The People*, 80 and note.
- PRESUMPTIONS** arising from attempt of defendant to escape from custody. *State v. Stevens*, 88.

PRIVILEGED COMMUNICATIONS.

- ATTORNEY AND CLIENT.**— Advice of counsel sought with a view to commit crime, not admissible in excuse of it. *Weston v. Com.*, 436.
- HUSBAND AND WIFE**, see **EVIDENCE**, 8.
- PHYSICIAN**, see **EVIDENCE**, 1.

PROSECUTING ATTORNEY.

See **PRACTICE**, 7. **ORDINANCE**, 8.

RECORD.

See **PRACTICE**, 14.

RES ADJUDICATA.

WHEN NO BAR.—An adjudication that defendant was not guilty of an offense punishable upon information filed before a justice of the peace cannot be pleaded in bar to an action for maintaining a nuisance. *Martin v. Bluttner*, 148.

STATUTES, CONSTRUCTION OF.

CONSTRUCTION OF STATUTES.—Unless a statute by its language expressly or by necessary implication demands such construction, it will not be construed as repealing a previous statute, or as being retrospective. *Ryan v. Com.*, 346.

See **ORDINANCE**.

STOLEN GOODS.

See **PRESUMPTIONS**.

THREATS.

1. **THREATS BY DEFENDANT AGAINST A THIRD PERSON.**—As a general rule, a threat by the defendant to kill some other person than the deceased is not admissible as evidence against him; but, in a case of mistaken identity, evidence showing malice on the part of the defendant towards the person for whom the deceased is supposed to have been mistaken, or threats made by him against that person, is relevant and admissible; yet the jury should be instructed to give no weight or consideration to such evidence, unless they are satisfied as to the fact of such mistaken identity. *Clarke v. The State*, 525. (See note.)
2. **SUBSEQUENT THREATS.**—In such case, the fact of mistaken identity being established, proof of threats made by the defendant towards the person for whom the deceased was mistaken, and of a difficulty between them, subsequent to the homicide, is competent and admissible against him, in connection with the precedent threats and other circumstances, in determining the intent and motive with which the fatal shot was fired. *Id.* (See *State v. Bezy*, 508.)

VENUE.

1. **PROOF OF VENUE.**—The sufficiency of the proof of venue cannot be considered by appellate court, in the absence of a ruling by the primary court, and exception duly reserved to it. *Clarke v. The State*, 525.
2. **VENUE** may be shown indirectly and circumstantially. *State v. Cantieny*, 418.
3. **VENUE OF OFFENSE.** *The State v. Shaeffer*, 259.
4. **SUFFICIENT ALLEGATION OF**, see **INDICTMENT**, 10.

VERDICT.

1. **FORM OF VERDICT FOR LESSER OFFENSE**—**DEFENDANT MUST ASK FOR.**—If it be desired by the defendant accused of a crime that an instruction of the form of verdict for the lesser offense be given, it is his duty to prepare and ask for such an instruction; and, failing to avail himself of that right, he is in no condition to complain. *Dacey v. The People*, 461; *State v. Cantieny*, 418; *Spies v. The People*, 570, p. 705.

2. VERDICT—DEGREE OF CRIME.—As there is only one degree of grand larceny, a verdict finding a person, who is charged with the crime of "grand larceny," "guilty as charged," will be sufficient under the statute, which provides that "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." *People v. Price*, 399.

JURYMEN NOT PERMITTED TO IMPEACH THEIR VERDICT. *State v. Price*, 33.

EFFECT OF VERDICT OF GUILTY of lower degree on second trial for murder, see MURDER.

WAIVER.

WAIVER OF TRIAL BY JURY, see CONSTITUTIONAL LAW, 7.

WITNESS.

1. IMPEACHING WITNESS.—The credibility of a witness cannot be impeached by proof of the declarations of third persons, not made in his presence. *Clarke v. The State*, 525.
2. SAME.—Under the Iowa statute the general moral character of a witness may be shown. *The State v. Hart*, 269.
3. CO-DEFENDANT. *Smith v. The People*, 80.
4. HUSBAND AND WIFE, see EVIDENCE, 8.

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